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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Communications Act provides that the Federal Communications Commission may not base a decision on "the expectation of Federal revenues" to be derived from an auction of broadcast spectrum. 47 U.S.C. § 309(j)(7)(A). In this case, the Commission revoked petitioner's permit to provide direct broadcast satellite service, reclaimed the spectrum allocated to petitioner, and auctioned it off for $735 million in proceeds to the Treasury. The questions presented are:

(1) Whether a court should apply heightened scrutiny to a government agency decision to reclaim assets when the reclaimed assets will be auctioned off, with the proceeds going to the government.

(2) Whether the Court of Appeals erred in concluding that the expectation of revenues was not a factor in the Commission's decision to revoke petitioner's permit, solely because the Commission did not say that it was, where (a) revoking the permit allowed the Commission to auction petitioner's spectrum for $735 million; (b) Congress applied extraordinary pressure on the Commission to auction the spectrum because of the anticipated revenues; (c) the Commission's decision made express reference to the hundreds of millions of dollars an auction would raise; (d) one Commissioner indicated on the record that while this case was pending a colleague asked him if the promised $175 million opening bid of a company vying for petitioner's spectrum persuaded him to hold an auction; (e) the Commission Chairman indicated in public statements that his vote was influenced by revenue considerations and Congress' views; and (f) the decision was inconsistent with Commission precedents and policy.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Advanced Communications Corporation, along with TEMPO DBS, Inc., and PRIMESTAR Partners L.P., were the appellants in the Court of Appeals; the Federal Communications Commission was the appellee. The Consumer Federation of America, the Center for Media Education, Directsat Corporation, DIRECTV, Inc., EchoStar Satellite Corporation, MCI Telecommunications Corporation, and United States Satellite Broadcasting Company, Inc., intervened in the court below on the side of the Commission.

Advanced Communications Corporation has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Advanced Communications Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported but the judgment is noted at 84 F.3d 1452 (table). The opinion is reprinted in the appendix hereto ("App.") at 1a. The opinion of the Federal Communications Commission is reported at 11 FCC Rcd 3399 and is reprinted at App. 12a. The opinion of the Commission's International Bureau is reported at 10 FCC Rcd 13337 and is reprinted at App. 79a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1996. App. 1a. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing

in banc on June 27, 1996. *Id.* at 10a-11a. The jurisdiction of the Court of Appeals was based on 47 U.S.C. § 402(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The provisions of 47 U.S.C. § 309(j)(7) and 47 C.F.R. § 100.19 (1995) are reproduced at App. 92a-93a.

INTRODUCTION

Petitioner Advanced Communications Corporation ("Advanced" or "ACC") is one of the pioneers in the development of direct broadcast satellite ("DBS") technology and service. DBS—a system providing satellite delivery of video programming directly to homes via small, inexpensive receiving dishes—is a cutting edge technology. Although first authorized by the Federal Communications Commission ("FCC" or "Commission") in 1982, DBS service just recently achieved technological feasibility and commercial viability. As the DBS industry evolved, the FCC found it necessary to grant extensions of the permits it had granted to those seeking to provide DBS service. Up until the time when Advanced requested the extension at issue here, the FCC had in fact granted *every* such request. Shortly before considering Advanced's request, however, the Commission was given a new power —the power to auction off spectrum allocations to the highest bidder, with the proceeds going to the Federal Treasury. Spectrum for the newly viable DBS service was a lucrative candidate for auction, but none was available —unless there was some way to reclaim spectrum from existing permittees.

There was. For the first time ever, the Commission, by a 3-2 vote, denied a request for extension of a construction permit—Advanced's—and reclaimed Advanced's spectrum for auction. The auction generated $735 million for the government, while Advanced was left with nothing. As one of the dissenting Commissioners put it, the majority "changed the DBS due diligence rules in the

middle of the game, unlawfully and unfairly disadvantaging an innocent participant," giving "companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, [while leaving] one of the pioneers of the DBS service with only a panful of mica." App. 71a, 78a (dissenting statement of Commissioner Quello).

The court below, however—in affirming the Commission decision—chose to treat the case as if it were a typical one in which agency action is subject to only deferential review. In particular, the court refused to apply more exacting scrutiny in light of the government's clear financial self-interest in the outcome of the proceeding, instead concluding that the prospect of auction revenues played no role in the Commission's decision, solely because the Commission did not say that it did. These fundamental errors in approach conflict with guidance in this Court's precedents, have significance beyond the confines of this case, and fully warrant this Court's review.

STATEMENT OF THE CASE

Background. When it first authorized DBS service, the FCC required DBS permittees—under its "due diligence" rules—to begin operating their satellites within six years of the grant of a permit, "unless otherwise determined by the Commission upon proper showing in any particular case." 47 C.F.R. § 100.19(b) (1995). After receiving its initial DBS permit in 1984, Advanced worked vigorously toward the goal of providing DBS service. It was the first permittee to propose and develop technical plans for DBS digital transmission, now the state of the art, and the first permittee to advocate interactive DBS service, and was instrumental in shaping the regulatory and commercial framework necessary to make DBS service a reality. C.A. App. 437-438.

Rapid changes in the nascent industry, however, made the task of initiating DBS service far more difficult than the FCC had first envisioned. Indeed, the FCC has acknowledged that it "could not have foreseen the tech-

nological advances that the service has experienced, nor did it have an opportunity to fashion its rules based on experience with the actual operation of the service." *Id.* at 114. Thus, as Advanced persevered, more than half of those who had been awarded DBS permits—including such large and established media corporations as CBS, Comsat, and RCA American Communications—dropped out or merged with other applicants. *Id.* at 435. No DBS permittee was able to complete construction of a satellite within six years, as the FCC's rules contemplated. In fact, it was not until October 1994—a full 12 years after the FCC began issuing permits—that *any* DBS service was available, when two permittees jointly launched DIRECTV and USSB. App. 27a.

The Commission therefore adopted a flexible approach to its due diligence rules, routinely granting requests for extensions of time to commence service. The Commission recognized that these extensions promoted "the public interest in the prompt initiation of DBS service," *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6861 (1988) ("*USSB I*"), in light of the ongoing efforts of permittees to develop their systems in the face of unanticipated technical, commercial, and other difficulties. Consistent with this policy, Advanced received in 1991 an initial extension of its construction permit, until December 1994. App. 3a.

The FCC's policy continued into a round of second extensions for permittees. For example, in 1992 the Commission granted USSB a second extension, awarding it an additional five years to construct and operate its DBS system. *United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247, 7249 (Mass Med. Bur. 1992) ("*USSB II*"). Likewise, in 1993 the Commission granted Dominion a second extension to complete its system, until December 1996, even though Dominion had not yet begun building any satellites. *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993) ("*Dominion*"), *recon. denied*, 10 FCC Rcd 12743 (1995).

By the same token, the FCC acknowledged the desirability of permittees "combin[ing] assignments and resources through merger or buyout" to expedite DBS service. *Continental Satellite Corp.*, 4 FCC Rcd 6292, 6299 (1989). Thus, shortly before its decision in this case, the Commission approved the sale by Directsat of its permit to EchoStar, even though the permit was due to expire in seven months and Directsat still had no satellites under construction. *Directsat Corp.*, 10 FCC Rcd 88 (1995). Shortly after its decision in the instant case to refuse Advanced an extension, the FCC *granted* the extension of the Directsat permit that was implicit in its approval of the transfer. *Directsat Corp.*, 11 FCC Rcd 1775 (Int'l Bur. 1996).

During its first extension period, Advanced sought to develop its DBS system in conjunction with another permittee, EchoStar. The two permittees signed a letter of intent to form a joint venture, coordinated system designs and budgets, and met with Commission staff to discuss the proposed venture's satellite system. When the EchoStar venture fell through, Advanced promptly made alternative arrangements to facilitate service. On September 16, 1994, it entered into a contract with TCI to obtain two substantially completed satellites, the first of which would have been ready for launch in April 1996. In exchange for the satellites and other specified consideration, Advanced agreed to provide TCI with all of the satellite transponder capacity. Advanced, however, was to retain ultimate control of the satellite's design, construction, launch, deployment, operation and insurance, as well as tracking and telemetry. Because Advanced's permit was due to expire before the anticipated launch, it requested an additional extension of time in which to complete its system. C.A. App. 389-391, 441-442. As noted, the Commission had granted every other such request. This time, however, something had changed.

The FCC's New Auction Authority. It had long been the FCC's practice to assign spectrum through lotteries or comparative hearings. In 1993, however, the Commu-

nications Act was amended to give the FCC authority to allocate spectrum by auction. *See* 47 U.S.C. § 309(j). The FCC's auction authority enabled the Commission, for the first time, to turn the allocation of spectrum into a profit-making enterprise—and an extremely lucrative one at that.[1]

The auction statute authorizes the FCC to issue licenses and permits through competitive bidding so long as the Commission employs "safeguards to protect the public interest in the use of spectrum" and seeks to promote the purposes of the Communications Act, including, among other things, "the development and rapid deployment of new technologies, products, and services for the benefit of the public." 47 U.S.C. § 309(j)(3)(A). Lest the advancement of the public interest be trumped by the government's pecuniary interest, the statute expressly prohibits the FCC from basing a decision on anticipated auction revenues. *Id.* § 309(j)(7)(A).

Nevertheless, the FCC's auction authority has reaped staggering sums for the Treasury. Indeed, since the FCC began auctioning spectrum in 1994, the Commission has raised over $15 billion. *See infra* at 12. The magnitude of the FCC's auction-derived revenues has been much touted by FCC Chairman Reed Hundt, who unabashedly stated in a public speech that "FCC stands for Federal Cash Cow." Hundt, Speech at National Consumers Week Symposium, Oct. 26, 1995 (as prepared for delivery). He used the term "Federal Cash Cow" again in a letter responding to then-presidential candidate Steve Forbes' call for abolition of the agency, and added that the FCC is also "the goose that lays the golden eggs." Broadcasting & Cable, Oct. 30, 1995, at 88.

Chairman Hundt has pointed to the billions raised by FCC auctions in resisting congressional attempts to cur-

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[1] The FCC is authorized to retain from the proceeds of any auction "such sums as may be necessary * * * for the costs of developing and implementing" the auction program; remaining proceeds are deposited in the Federal Treasury. 47 U.S.C. § 309(j)(8)(A), (B).

tail his agency's budget.[2] Appearing before a congressional subcommittee considering the FCC's annual appropriation, Chairman Hundt testified that "the FCC happens to be in all of the annals of government, around the globe, the largest single government profit center. We are the Federal Auction Commission in that sense, and we have raised nearly $9 billion in auctions so far." *Reauthorization of the Federal Communications Commission: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 1st Sess. 8 (1995) ("Appropriation Hearings"). Chairman Hundt has proposed funding the FCC's entire budget from auction proceeds. *See id.* at 14-15. In short, there can be no doubt that the highest ranks of the FCC perceive the maximization of auction revenues to be a central part of the FCC's mission.

The Decision of the FCC International Bureau. In April 1995, the FCC's newly-created International Bureau, in its very first decision involving DBS, ruled that Advanced's extension request should be denied and its spectrum reclaimed. App. 79a. Undeniably misconstruing FCC precedent,[3] the Bureau held that Advanced had not satisfied the Commission's due diligence rules. *Id.* at 84a-89a. Advanced promptly petitioned the full Commission for review. C.A. App. 426-516.

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[2] When a Senate subcommittee voted to cut the FCC's budget by 20%, Chairman Hundt "called the action 'a mistake' that could result in an end to the FCC spectrum auctions. * * * 'The Senate appropriations subcommittee would kill this cash cow, even while we're trying to milk it for billions more dollars in auction revenue.'" Stern, *Hundt Calls Budget Slash "Mistake"*, Broadcasting & Cable, Sept. 11, 1995, at 13. And when Senator Pressler, the Chairman of the Senate Commerce Committee, said that he hoped the FCC would "wither away," Chairman Hundt responded that the most recent FCC auction had raised $4 million per FCC employee. *See* Wall St. J., March 17, 1995, at A1.

[3] For example, the Bureau erroneously read the FCC's decision in *USSB I* to deny an extension to a DBS permittee when, in fact, the FCC had *granted* the request. App. 86a & n.18. The full Commission was forced to acknowledge this glaring error. *Id.* at 28a n.54.

The Congressional Pressure Applied to the FCC to Auction Advanced's Spectrum. The International Bureau's decision—and the possibility that Advanced's spectrum might be available for auction—attracted considerable attention on Capitol Hill. Enticed by the hundreds of millions of dollars that auctioning Advanced's spectrum would add to federal coffers, Congress brought tremendous pressure to bear upon the FCC to do just that.

While Advanced's petition for review was pending before the full Commission, Congress held hearings to consider the FCC's future appropriations. At those hearings, at which all five Commission members appeared, Congress' strong preference for auctions was made clear. *See, e.g.*, Appropriation Hearings at 26. Jack Fields, the Chairman of the House Telecommunications and Finance Subcommittee, specifically criticized the FCC for allocating certain wireless cable licenses by lottery rather than auction and pointedly asked the three commissioners who had voted for a lottery to justify their decision—"[p]articularly in light of * * * the attitude of Congress toward * * * lotteries versus auctions." *Id.* at 27.

Even more notably, while the matter was still pending before the FCC, Senators McCain and Dorgan introduced an amendment to the 1996 appropriations bill covering the FCC that precluded the Commission from taking any action on Advanced's pending applications other than to auction the spectrum. *See* 141 Cong. Rec. S14513 (daily ed. Sept. 28, 1995). As Senator McCain explained, the amendment "would mandate that the FCC auction" Advanced's DBS spectrum. *Id.* The Senate adopted the McCain-Dorgan amendment by a vote of 98-0. *See id.* at S14586 (daily ed. Sept. 29, 1995). It never became law since, as shown below, soon after the vote the FCC did on its own what the amendment would have required.

The recorded floor debate on the amendment confirms, first, that the amendment was driven by Congress' desire to raise revenue. Senator McCain declared that "we must act in a manner that ensures this spectrum is sold for the

highest amount possible," *id.* at S14514, and an estimate that an auction of Advanced's spectrum would yield $300-$700 million was repeatedly bandied about.[4] After passage of the amendment, Senator Brown took to the floor "to congratulate Senator McCain for pursuing the laudable goal of maximizing revenues for the Treasury." *Id.* at S14692.

Second, the record reflects the amendment was intentionally designed to influence the Commission's action regarding Advanced. Senator McCain made no bones about it, saying that "the FCC is at a standstill regarding this issue. It is looking to the Congress for guidance." *Id.* at S14514.[5] Third, in the floor debate Senator McCain attributed the International Bureau's decision to Congress' efforts, expressing the view that "[t]he bureau felt compelled to use a new, tougher definition of due diligence due to the congressional mandate regarding spectrum auctions." *Id.*

MCI's Opening Bid and the Decision of the Full Commission. Lest there be any doubt about what would become available if Advanced's pending applications were denied, on October 10, 1995, the President of MCI Communications Corporation ("MCI") sent a letter to Chairman Hundt announcing that in an auction for Advanced's spectrum MCI "will submit an opening bid of $175

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[4] *See* 141 Cong. Rec. at S14513, S14515, S14516, S14573, S14586 (statements of Sen. McCain); *id.* at S14515 (statement of Sen. Gramm); *id.* at S14574, S14575, S14586 (statements of Sen. Dorgan). *See also id.* at S14575 (statement of Sen. Brown) ("I think all Members are aware that there is a great deal of money available in the disposition of this matter.").

[5] *See also id.* at S14516 (statement of Sen. McCain) (recognizing that the FCC had not made "a final ruling"). The Senate was aware of a report that the FCC was divided and undecided on the case. According to Senator Hollings, "[l]awyers call from both sides of this case. I understand, now, the vote is 2 to 2 at the FCC: Two members of the FCC disposed toward an auction, two disposed toward what they characterize as the recommendation of the staff * * *. There is one indecisive member." *Id.* at S14574.

million." C.A. App. 768. Six days later—less than three weeks after the Senate adopted the McCain-Dorgan amendment—the FCC by a 3-2 vote upheld the International Bureau's decision and announced that Advanced's spectrum would be auctioned. App. 14a.

A bare majority of the Commission acknowledged Advanced's many "laudable" contributions to the DBS industry, *id.* at 33a, but determined that Advanced did not meet the due diligence requirement because it had not launched DBS service within the time provided under its permit. *Id.* at 29a-46a. This rigid approach was warranted, it said, because the launch of service by DIRECTV in October 1994 had "ushered in [a] new era" in the DBS industry. *Id.* at 27a. The FCC canceled Advanced's permit and announced that it would institute a rulemaking to establish procedures for auctioning the newly-available spectrum. *Id.* at 15a. The Commission specifically noted that in such an auction "MCI has stated it would submit an opening bid of $175 million." *Id.* at 48a n.127.

Commissioners Andrew Barrett and James Quello dissented. Commissioner Barrett stated that it "seems entirely unreasonable, and, indeed, irresponsible, for the Commission to disregard its primary objective—to encourage competition amongst DBS providers in order to enhance consumer choice—by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future." *Id.* at 65a. He added that he was "puzzled as to why the Bureau determined to apply a different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service" and that he did "not believe that ACC's efforts are patently distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application." *Id.* at 66a.

Commissioner Quello stated that "[i]n its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly dis-

advantaging an innocent participant." *Id.* at 71a. Like Commissioner Barrett, he took the majority to task for "fundamentally misappl[ying] Commission precedent" and "set[ting] up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts." *Id.* at 71a, 78a.

Events Subsequent to the FCC's Decision. On October 17, 1995—the day after the FCC's opinion was adopted and the day *before* it was officially released—Chairman Hundt granted an interview in which he spoke freely about the strong impression the Senate amendment mandating the auctioning of Advanced's spectrum had made upon him. Of the Senate's unanimous vote, the Chairman said "[n]inety-eight senators. I agree that it's not the law but it is a powerful expression of opinion." *Hundt Explains Call for Auction,* Satellite Business News, Oct. 25, 1995, at 1, 26 (transcript of interview).

On October 30, 1995, the FCC instituted a rulemaking proposing procedures for conducting DBS auctions. C.A. App. 106-161. Significantly, in that proceeding, Commissioner Barrett revealed on the record that "prior to rendering a decision in the *Advanced* [case], one of my colleagues asked me whether [MCI's $175 million] alleged opening bid would persuade me that auctioning ACC's channels was appropriate." *Id.* at 160 n.5.[6]

On December 15, 1995, the Commission issued an order authorizing an auction of the spectrum previously assigned to Advanced. *Id.* at 177-278. On January 24 and 26, 1996, Advanced's spectrum was auctioned off for nearly $735 million. MCI won the most valuable portion of the spectrum with a staggering bid of $682.5 million and EchoStar won the remainder with a bid of $52.3 million. *Id.* at 893-894.

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[6] MCI's $175 million opening bid is mentioned at least five other times in the rulemaking. C.A. App. 136 n.123, 137 n.129, 142, 143 n.147, 160 & n.4.

If it were not clear enough that money was the driving force behind the decision to reclaim Advanced's spectrum for auction, Chairman Hundt removed all doubt in a speech delivered shortly after the auction in which he candidly stated:

> [I]t wasn't really relevant that Rupert Murdoch [7] had to give me a king's ransom, an absolute fortune, a colossal sum, $682 million in an auction for the DBS satellite slot.
>
> The amount didn't matter at all.
>
> Who am I kidding?
>
> I can now reveal the truth about the auctions. Don't pass it on. We intended all along to raise in auctions of the airwaves more money than Bill Gates has.
>
> Last week we hit the target, and we're now at $15.8 billion with dozens of auctions yet to go. [Hundt, Speech to the Artists Rights Foundation, Feb. 15, 1996 (as prepared for delivery).[8]]

The Court of Appeals' Decision. The Court of Appeals upheld the FCC's decision. App. 1a-9a. Noting that its review was deferential, the court rejected Advanced's claims that the FCC (1) departed arbitrarily from its own precedents granting extensions to other DBS permittees and approving the for-profit sale of a permit, and (2) failed to provide a reasoned explanation for its decision, which delayed the initiation of new DBS service in contravention of the agency's previously articulated goals. *Id.* at 5a-9a. Finally, the court refused to discern any "illicit motivation on the part of the FCC," explaining that the

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[7] News Corporation, which is owned by Mr. Murdoch, is MCI's partner in its DBS venture. *See* Samuels, *Gore-ing Malone's Ox*, Forbes, Sept. 9, 1996, at 56.

[8] In considering this case, this Court may take the Chairman's public statements into account. *See Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983); *Southern Louisiana Area Rate Cases* v. *Federal Power Comm'n*, 428 F.2d 407, 438 n.98 (5th Cir.) (taking judicial notice of speeches by FPC commissioners), *cert. denied*, 400 U.S. 950 (1970).

FCC's opinion "does not base its denial of ACC's renewal application on the expectation of [auction] revenues." *Id.* at 9a. The Court of Appeals having denied a timely petition for rehearing and suggestion for rehearing in banc, *id.* at 10a-11a, Advanced now seeks review of that court's judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THAT, CONTRARY TO THE VIEW OF THE COURT OF APPEALS, THE FACT THAT THE GOVERNMENT STANDS TO GAIN HUNDREDS OF MILLIONS OF DOLLARS IF AN AGENCY RECLAIMS ASSETS FOR AUCTION TRIGGERS HEIGHTENED JUDICIAL SCRUTINY OF THE DECISION TO DO SO.

In 1993, for the first time, Congress and the President gave the FCC the power to auction spectrum for profit. In the words of one commentator, this effected "one of the biggest changes in the history of United States regulation of the airwaves since the sinking of the Titanic led the federal government to seize control of the airwaves." Allard, *The New Spectrum Auction Law,* 18 Seton Hall Legis. J. 13, 54-55 (1993). This is no overstatement. Spectrum auctions have yielded over $15 billion, *see supra* at 12, and are already figuring prominently in the Nation's fiscal planning. *See* Shelton, *Why the Dole Plan Adds Up,* Wall St. J., Aug. 27, 1996, at A12 (reporting that President Clinton's economic plan calls for raising $44 billion in revenues from spectrum auctions and that presidential candidate Robert Dole's plan calls for raising $34 billion from auctions).

Congress recognized in the Communications Act the danger that the prospect of garnering revenue might sway the FCC from its proper mission. Thus, the Act provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding." 47 U.S.C. § 309 (j)(7)(A). The legislative history of

this provision reinforces the clear intent of the statutory language:

> The Committee intends the FCC to make its decisions based on sound communications policy pursuant to the Communications Act. *The Commission is not a collection agency of the U.S. Government, and should not be influenced by budgetary considerations.* This paragraph is designed to insulate the FCC's communications policy decisions from budgetary pressures, and clarifies that *important communications policy objectives should not be sacrificed in the interest of maximizing revenues from auctions.* [H.R. Rep. 103-111, 103d Cong., 1st Sess. 258 (1993) (emphasis added).]

Thus, the meaning of Section 309(j)(7)(A) is clear: the federal revenues that an auction might generate may not be a factor in the FCC's decision on a matter within its purview.[9]

In the court below, Advanced argued that it was necessary to subject the FCC's decision to heightened scrutiny, given the agency's interest in reclaiming Advanced's spectrum so that it would be available for auction. *See* Opening Br. 28-29; Reply Br. 3, 7-8; Pet. for Reh'g 8-11 & n.2. The Court of Appeals disagreed, stating that "[o]ur review of the Commission's decision is deferential" and that it would apply a "strong presumption of agency regularity." App. 5a, 9a (quotation marks omitted). The Court of Appeals erred in treating this case like any run-of-the-mill agency adjudication.

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[9] It is clear that, to violate Section 309(j)(7)(A), the expectation of revenues need only be *a* factor, not the only or the major factor, in the FCC's decision. The very next subsection of the Act, Section 309(j)(7)(B), provides that in issuing auction-related regulations the FCC may not base its decision "solely or predominantly on the expectation of Federal revenues." Because the "solely or predominantly" language is missing from Section 309(j)(7)(A), that provision should be read more broadly to prohibit *all* consideration of revenues by the FCC. The headings of the two subsections confirm this reading. *Compare* § 309(j)(7)(A) ("Consideration prohibited") *with* § 309(j)(7)(B) ("Consideration limited").

A. Compliance With Section 309(j)(7)(A) Is Necessary For The FCC's Auction Authority To Comport With Due Process.

The Due Process Clause long ago came to mean that a government decisionmaker cannot have a pecuniary interest in the outcome of his own decisions. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "This applies to administrative agencies which adjudicate as well as to courts," *Withrow*, 421 U.S. at 46, and to any "depriv[ation] of a protected interest, whether in a criminal or civil setting." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993).

For a decisionmaker to have a financial stake in one of his own decisions is a textbook case of unconstitutional bias:

> [V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome * * *. [*Withrow*, 421 U.S. at 47 (footnote omitted).]

This Court's precedents establish, moreover, that this constitutional principle is not limited to cases in which the decisionmaker stands to profit personally, but also applies where officials have an interest in raising revenues for their employer, the government. *See Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980).

In *Tumey* this Court held that it violated due process for a village mayor to adjudicate prohibition violations where his village received a portion of the fines he imposed. For a unanimous Court, Chief Justice Taft stated

that the test is whether there would be "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." *Tumey*, 273 U.S. at 532.[10]

Building on *Tumey*, this Court held in *Ward* that a mayor's adjudication of traffic offenses, the revenues from which contributed to his village's finances, violated due process. The Court explained that the mayor faced a "possible temptation" to raise money for the village which "may make him partisan." 409 U.S. at 60. That situation, the Court said, "necessarily involves a lack of due process of law." *Id.* (quoting *Tumey*, 273 U.S. at 534). Notably, the Court reached this decision notwithstanding the dissent's observation that "[t]he Ohio mayor who judged this case had no direct financial stake in its outcome." *Id.* at 62 (White, J., dissenting).

Ward and *Tumey* thus stand for the proposition that for a government decisionmaker to have an impermissible pecuniary interest in a case, he need not stand to profit directly from his decision. *Accord Marshall*, 446 U.S. at 242-243, 250 (reaffirming *Ward* and *Tumey* and stating that unconstitutional bias can derive from "the prospect of *institutional* gain") (emphasis added).

It is clear under these cases that the FCC has a direct financial stake in auctioning spectrum. Because the FCC is entitled to recover the cost it incurs in conducting spectrum auctions, *see supra* note 1, it profits from auctions in the sense that, were it to allocate the spectrum by other means, the cost would come out of its budget. Allo-

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[10] The mayor's salary in *Tumey* was supplemented by the fees and costs levied by him but the Court made clear that this "is not the only reason for holding that due process of law is denied to the defendant here." *Tumey*, 273 U.S. at 532. *See Ward*, 409 U.S. at 60 ("The fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle."); *Marshall*, 446 U.S. at 242-243.

cating spectrum by auction thus allows the FCC to devote more of its budget to other ends. The money involved is substantial. *See* Stern, *Hundt Calls Budget Slash "Mistake"*, Broadcasting & Cable, Sept. 11, 1995, at 13 (noting that the FCC will recover most of its $20 million in auction-related administrative costs).

Beyond this, the FCC has a powerful institutional interest in generating auction revenues. Large bureaucracies (and the bureaucrats who populate them) have an interest in pleasing the legislators who control their budgets and hence their power, prestige, and influence. The FCC is no different. Spectrum auctions can produce billions of dollars in federal revenues and Congress—which has its own institutional interest in maximizing the funds available for spending without raising taxes or adding to the budget deficit—knows this. Thus, it should come as no surprise that Congress has pressured the FCC to hold auctions and that the FCC has trumpeted the revenues its auctions have generated when congressional budget cutters whetted their knives. *See supra* at 6-7. The great importance with which the FCC views auction revenues is reflected in the comments of its current Chairman, who seemingly passes up no opportunity to boast of the billions of dollars auctions have produced. *See supra* at 7, 12.[11] In sum, it can fairly be said that FCC officials—when confronted with a decision whether to reclaim spectrum for auction—are in a situation "which would offer a possible temptation to the average man as a judge * * * which might lead him not to hold the balance nice, clear and true." *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). The "institutional gain" (*Marshall*, 446 U.S. at 250) that the FCC derives from auctions is undeniable, and the enormous financial stakes at issue here simply dwarf those found to create an unconstitutional risk of bias in *Tumey* and *Ward*.

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[11] As noted, Chairman Hundt has proposed funding the FCC entirely with auction revenues. *See supra* at 7. The viability of that proposal, of course, depends upon the FCC's ability to produce sufficient auction revenues.

B. Heightened Scrutiny Of The FCC's Decisions To Reclaim Spectrum For Auction Is Necessary To Avoid A Serious Constitutional Question.

As this Court has said, it "makes sense to scrutinize governmental action more closely when the State stands to benefit." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 56 (1993) (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.)).[12] And it makes even more sense where, as here, Congress—acting out of eagerness for auction revenues—applied intense pressure to the FCC to decide a pending case in a manner that would make the spectrum at issue available for auction. *See ATX, Inc.* v. *United States Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (substantial congressional pressure on agency to reach certain decision "warrant[s] close examination"). But not only does heightened scrutiny in this case make sense in light of the congressional and financial pressures involved, it was against just such pressures that Section 309(j)(7)(A) was designed to guard. Accordingly, applying heightened scrutiny is fully consistent with the Communications Act.

This Court's recent decision in *Concrete Pipe* establishes that where there is a danger that an initial decisionmaker is biased, due process requires nondeferential review of its decision. *Concrete Pipe* involved a challenge to the procedures by which liability is assessed for employers withdrawing from a multiemployer pension plan. Under federal pension law, the sponsor of such a plan calculates an exiting employer's "withdrawal liability" following which, if a settlement is not reached, the matter is referred to arbitration. At issue in *Concrete Pipe* was a statute providing that in such an arbitration the plan sponsor's determination is "presumed correct" absent a

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[12] *See also United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's [financial] self-interest is at stake").

sufficient showing by the employer. The employer contended that because a plan sponsor necessarily would be biased in its initial assessment of withdrawal liability, the presumption applicable in a subsequent arbitration denied the employer the constitutional right to an impartial adjudicator. *Concrete Pipe*, 508 U.S. at 609-615.

The critical issue was the showing the employer had to make in arbitration to rebut the presumption favoring the plan sponsor (which the Court assumed to be biased). Applying the canon that statutes should be construed to avoid serious constitutional problems, the Court read the statute to "permit[] adjudication of the facts by the arbitrator without affording deference to the plan sponsor's determinations." *Id.* at 626. "[R]equiring a showing that * * * would grant the plan sponsor's factual findings a great deal of deference," the Court said, would present "a substantial question of procedural fairness under the Due Process Clause." *Id.* at 625, 626.

Under *Concrete Pipe*, the Court of Appeals erred in reviewing the reasons supplied by the FCC for its decision in this case "deferential[ly]" and with a "strong presumption of agency regularity." App. 5a, 9a. As shown above, there is a serious risk that the $735 million auctioning Advanced's spectrum predictably generated distorted the FCC's decisionmaking in violation of Advanced's right to due process. Therefore, to avoid a serious constitutional question—as in *Concrete Pipe*—Advanced is entitled to a review of the FCC's decision that does not simply replicate the Commission's potential bias by affording the decision deference.

The Court of Appeals' deferential review of the FCC's decision conflicts on a fundamental level with many decisions of this Court and other courts recognizing, in a wide variety of legal contexts, that heightened scrutiny is appropriate when the government has a financial stake in the action under review.

Under the Contracts Clause, courts reviewing a State's impairment of contracts between private parties "properly

defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust Co.* v. *New Jersey*, 431 U.S. at 23. But when a State impairs one of its own contracts such deference "is not appropriate because the State's self-interest is at stake." *Id.* at 26. There is, in short, "heightened Contract Clause scrutiny when States abrogate their own contractual obligations." *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2455 (1996) (plurality opinion).[13] A "dual standard of review" also applies under the Fifth Amendment to the Federal Government's impairment of contractual obligations. *United States Trust Co.*, 431 U.S. at 26 n.25. *See Perry* v. *United States*, 294 U.S. 330, 350-351 (1935).[14]

Under well-established Commerce Clause jurisprudence, courts give greater scrutiny to laws designed to favor a State's economic self-interest than to those that are even-handed in their treatment of in-state and out-of-state interests. *See, e.g., Oregon Waste Systems, Inc.* v. *Depart-*

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[13] *See also Winstar Corp.*, 116 S. Ct. at 2466 n.41 (opinion of Souter, J.) ("Our Contract Clause cases have demonstrated a * * * concern with governmental self-interest"); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 n.15 (1978) ("impairments of a State's own contracts * * * face more stringent examination under the Contract Clause"); *Association of Surrogates & Supreme Court Reporters* v. *New York*, 940 F.2d 766, 771 (2d Cir. 1991) ("when the state's legislation is self-serving and impairs the obligations of *its own* contracts * * * a more searching analysis under the contract clause is appropriate") (emphasis in original).

[14] Just last Term in *Winstar Corp.*, this Court upheld the liability of the United States for breach of contract arising from Congress' enactment of legislation that had the effect of repudiating its contractual obligation. Rejecting the Government's defense based on the sovereign acts doctrine, Justice Souter observed that "some line has to be drawn * * * between regulatory legislation that is relatively free of government self-interest * * * and, on the other hand, statutes tainted by a governmental object of self-interest." 116 S. Ct. at 2465. "The greater the Government's self-interest," he added, "the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence." *Id.* at 2466.

ment of Environmental Quality, 114 S. Ct. 1345, 1350 (1994); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). In holding that due process requires notice and an opportunity for a hearing in civil forfeiture cases, this Court emphasized that a hearing "is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." *James Daniel Good*, 510 U.S. at 55-56. And in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989), the Court held that the Excessive Fines Clause does not apply to punitive damages awards in cases between private parties, but noted that it would be a different case if the government had "used the civil courts to extract large payments or forfeitures for the purpose of raising revenue."

In many other contexts as well the recognition of the government's pecuniary interest has affected a court's standard of review. *See United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974, 984 (9th Cir. 1995) ("All assets seized by the Department of Justice go into its Asset Forfeiture Fund, which the Attorney General is authorized to use for law enforcement purposes. This incentive enhances the need for close scrutiny of *in rem* forfeitures.") (citation omitted); *Coalition to End the Permanent Congress* v. *Runyon*, 979 F.2d 219, 225 (D.C. Cir. 1992) (opinion of Silberman, J.) ("It seems to me that a statute that provides a subsidy to incumbents directly in contemplation of an election * * * must be subject to heightened scrutiny.") (emphasis omitted); *Massachusetts* v. *Secretary of HHS*, 749 F.2d 89, 96 (1st Cir. 1984) ("the Secretary's obvious pecuniary stake in this case is bound to heighten our scrutiny of her reading of the statute"), *cert. denied*, 472 U.S. 1017 (1985).[15]

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[15] Similar holdings can be found in the context of private decisions infected by pecuniary interest. *See Atwood* v. *Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995) ("[W]e apply 'heightened scrutiny' [under ERISA] where the plan administrator has a conflict of interest by virtue of its economic stake in the benefit deci-

C. When Reviewed Without Improper Deference, The FCC's Decision Is Unlikely To Withstand Judicial Scrutiny.

In the Court of Appeals, Advanced argued that the FCC departed from its precedents and policies in denying Advanced's extension request—the first and so far only time the agency has taken such action. *See* Opening Br. 27-46; Reply Br. 12-27; Pet. for Reh'g 12-15. Specifically, Advanced argued that this case was materially indistinguishable from others in which the FCC granted extensions (and second extensions) to DBS permittees, and that the FCC's decision in this case contravened the agency's settled policy of facilitating the prompt initiation of DBS service. For present purposes, the fine points of Advanced's argument are not important. What is important is that without the "deferential" standard of review and "presumption" of regularity that the Court of Appeals employed, App. 5a, 9a, the explanation tendered by the FCC majority for its decision likely would not have passed muster. Indeed, two of the five Commissioners—who, unlike the Court of Appeals, gave no deference to the majority's reasoning—filed compelling dissents. *Id.* at 64a-78a.

Far from examining the reasons given by the FCC for its unprecedented decision to deny Advanced's extension request "more closely," *James Daniel Good*, 510 U.S. at 56, the court below went to the other extreme, concluding that the agency action was not affected by the prospect of auction revenues because the agency did not boldly admit on the record that it was. It is to that related error that we now turn.

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sions which it makes."); *In re Fine Paper Antitrust Litig.*, 840 F.2d 188, 195-196 (3d Cir. 1988) ("In fund in court cases, * * * where there is a conflict of interest between fee applicants and class members interested in the ultimate distribution, heightened judicial scrutiny is required.").

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE $735 MILLION IN REVENUES YIELDED BY THE AUCTION OF PETITIONER'S SPECTRUM PLAYED NO PART IN THE FCC'S DECISION IN THIS CASE.

The Court of Appeals rested its conclusion that the FCC's decision to deny Advanced an extension was not based on the expectation of revenues solely on the fact that "*the Order* does not base its denial of ACC's renewal application on the expectation of such revenues." App. 9a (emphasis added). The court added that it was "unwilling" to attribute to the FCC a motivation not reflected in "the text of the Order." *Id.*

The Court of Appeals' myopic approach to this case cannot be correct. To find that an FCC decision was impermissibly based on the expectation of revenues only where the Commission expressly announces that it was ignores the purpose of Section 309(j)(7)(A) and makes that law meaningless.

When Advanced's extension request came before the Commission, the Commission was faced with a stark choice: grant the request, as it had in every other such case to come before it, and secure the initiation of DBS service at Advanced's spectrum locations within a few months—or, for the first time ever, deny the request, free up the spectrum for auction pursuant to the newly-obtained auction authority, and realize hundreds of millions of dollars for the Federal Treasury. The notion that the prospect of such revenues played *no role* in the Commission's consideration of Advanced's extension request is palpably implausible and, in any event, refuted by the record. *See* App. 48a n.127.

The Court of Appeals' reluctance to look beyond the FCC's formal explanation for its decision is not justified by this Court's cases. This Court has "routinely inquired into the motivation underlying executive or administrative decisions in a variety of contexts." Tribe, American Constitutional Law § 12-5, at 814-815 (2d ed. 1988)

(footnote omitted). In such cases, this Court has created a mode of analysis for determining whether a governmental decision was based on legally prohibited factors, improper motive, or other impermissible considerations. *See, e.g., Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-268 (1977); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.).

Determining the basis for an agency's decision "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. The factors relevant to the analysis include (1) the impact of the decision at issue; (2) the historical background of the decision; (3) the specific sequence of events leading up to the decision; and (4) the legislative or administrative history of the decision, including contemporary statements by members of the decisionmaking body. *Id.* at 266-268; *Lukumi Babalu Aye*, 508 U.S. at 540. All four of these factors—plus a fifth one—point to the conclusion that the FCC's expectation of revenues was a motivating factor causing the agency to reclaim Advanced's spectrum for auction.

Impact of the decision. Denying Advanced's applications permitted the FCC to auction Advanced's spectrum, collecting the tidy sum of $735 million. The fact that the impact of the FCC's decision was the addition of $735 million to the Treasury lends support to the view that the FCC was motivated, at least in part, by the expectation that its action would have that very effect. *See Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 n.24 (1979) ("What a legislature or any official entity is 'up to' may be plain from the results its actions achieve").

Historical background. The backdrop to this case further fuels the suspicion that revenue was the reason Advanced lost its DBS spectrum. Since the Commission acquired auction authority, Chairman Hundt has made much of the FCC's contributions to the national fisc. In

public statements, he has proudly proclaimed that "FCC stands for Federal Cash Cow," that his agency is the "Federal Auction Commission," and that the Commission is "the goose that lays the golden eggs." And he has cited the billions of dollars in FCC auction revenues to defend the Commission's budget from those on Capitol Hill who would slash it. *See supra* at 6-7. In short, the FCC's decision in this case cannot be viewed except in the context of an agency with a powerful political and institutional incentive to maximize auction revenues.

Events leading up to the decision. As this Court has explained, policy reversals, departures from normal procedures, and the disregard of "factors usually considered important by the decisionmaker [that] strongly favor a decision contrary to the one reached" call into question the decisionmaker's motive. *Arlington Heights*, 429 U.S. at 267.

Prior to this case, the FCC had *never* denied a DBS permittee's request for an extension of time, even when the requesting permittee was seeking a second extension. After ruling against Advanced, the Commission continued to dole out extensions, without exception, to all comers.[16] Furthermore, in *USSB II*, *Dominion Satellite*, and *Directsat*, the FCC approved applications virtually identical to those of Advanced that the Commission denied here. *See supra* at 4-5. Finally, by denying Advanced's applications—which would have resulted in the initiation of service in April 1996—the FCC ignored its settled policy of facilitating prompt delivery of DBS to the public. *See supra* at 4. In light of the above, Commissioner Quello was quite right to comment that the majority "changed the DBS due diligence rules in the middle of the game,

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[16] *See Echostar Satellite Corp.*, 11 FCC Rcd 3017 (Int'l Bur. 1996); *Directsat Corp.*, 11 FCC Rcd 1775 (Int'l Bur. 1996); *Direct Broadcasting Satellite Corp.*, DA 95-2439 (Int'l Bur. rel. Dec. 8, 1995); *Continental Satellite Corp.*, 11 FCC Rcd 1157 (Int'l Bur. 1995).

unlawfully and unfairly disadvantaging" Advanced. App. 71a. In sum, there is much here "about the sequence of events leading up to the decision that would spark suspicion." *Arlington Heights*, 429 U.S. at 269.

Administrative history. The official proceedings in this case provide still further evidence that the FCC impermissibly considered revenues in reaching its decision. The FCC's own Opinion and Order makes explicit reference to the large sums to be gained by auctioning Advanced's spectrum. *See* App. 48a n.127 (noting MCI's opening bid of $175 million for Advanced's spectrum). As the Court of Appeals said, "the Commission was aware that substantial sums could be realized from the sale of any orbital slots and channels recovered from ACC." *Id.* at 9a. Furthermore, Commissioner Barrett indicated *on the record* in the companion proceeding to establish auction procedures that, prior to rendering a decision in the Advanced case, a colleague asked him whether MCI's multimillion dollar bid "would persuade me that auctioning ACC's channels was appropriate." C.A. App. 160 n.5. Finally, Chairman Hundt in a public address delivered shortly after the auction of Advanced's spectrum stated that the $682 million that MCI and its partner paid for the lion's share of Advanced's spectrum—what he called without exaggeration "a king's ransom, an absolute fortune, a colossal sum"—"wasn't really relevant" and "didn't matter at all." He quickly added, however, "[w]ho am I kidding? * * * We intended all along to raise in auctions of the airwaves more money than Bill Gates has." *See supra* at 12.

Congressional pressure on the FCC. There is a fifth factor strongly indicating that anticipated federal revenues played a role in the FCC's decision. In this case there was intense congressional pressure on the FCC to auction Advanced's spectrum to raise revenue. That pressure took the form most significantly of a 98-0 Senate vote passing legislation *requiring* the FCC to auction Advanced's spectrum by denying funds to take any other

action, sending a message the FCC Chairman confirmed he received, loud and clear. *See supra* at 8, 11. The avowed purpose of the Senate's action was to raise revenue and influence the FCC's decision in this case. *See supra* at 8-9. Finally, the FCC's decision also came at a time when Congress was considering and holding hearings on the Commission's budget. *See supra* at 8. There can be little doubt that the outcome of this case was influenced by "having Congress intervene in the middle of the adjudicatory action by the FCC." 141 Cong. Rec. S14575 (statement of Sen. Brown).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed May 6, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1551

ADVANCED COMMUNICATIONS CORPORATION, *et al.*,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Intervenors

Consolidated with Nos. 95-1560 and 95-1561

Appeals from an Order of the
Federal Communications Commission

Before BUCKLEY, WILLIAMS and HENDERSON, *Circuit Judges*

JUDGMENT

These appeals were considered on the record from the Federal Communications Commission and on the briefs and oral arguments of the parties. The issues have been accorded full consideration by the court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the attached memorandum, it is

ORDERED AND ADJUDGED that the decision of the Federal Communications Commission be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

PER CURIAM

FOR THE COURT:

/s/ Mark J. Langer
MARK J. LANGER
Clerk

Attachment

MEMORANDUM

I.

In 1984, the Federal Communications Commission ("FCC" or "Commission") awarded Advanced Communications Corporation ("ACC") a conditional construction permit to provide direct broadcast satellite ("DBS") service. Under the Commission's DBS rules, a permittee must satisfy two due diligence requirements: First, it must "begin construction or complete contracting for construction of [its satellite system] within one year of the grant of the construction permit"; and second, it must begin operating its system "within six years of the construction permit grant." 47 C.F.R. § 100.19(b). These requirements were designed, *inter alia*, to ensure the prompt use of DBS spectrum resources.

ACC fulfilled the first due diligence requirement, and in 1986 it was awarded orbital slots and channels. ACC failed to meet the second requirement, however, and requested a four-year extension, which the Commission granted in *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2274 (1991).

During this extension period, ACC entered into negotiations with another DBS permittee, Echostar Satellite Corporation ("EchoStar"), to form a joint venture for the provision of DBS service. After several years of negotiations, however, the proposal was abandoned. Shortly before the expiration of the extension, ACC entered into an arrangement with Tele-Communications, Inc. ("TCI") and TCI's subsidiary, Tempo DBS, Inc. ("Tempo"), that took two alternative forms. Under the first, ACC would, subject to FCC approval, simply transfer its DBS permit to Tempo in a for-profit sale. In the alternative, under a so-called Capacity Purchase Agreement ("CPA"), TCI would provide two of its satellites "for ACC's use" and would issue to ACC shares of TCI stock worth approximately $45 million, in exchange for which ACC would

permanently convey "all of the transponder capacity" of the two satellites back to TCI. The agreement called for ACC's ultimate dissolution and the distribution of the TCI stock to ACC's sole shareholder. Under either arrangement, the satellite transponder capacity would be made available to Primestar Partners, L.P. ("Primestar"), an affiliate of TCI.

In August 1994, ACC requested an additional four-year extension within which to construct and launch its DBS system. It also requested permission to assign its permit to Tempo. On April 26, 1995, the FCC's International Bureau denied the request for a second extension, finding that it would not serve the public interest. *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 at ¶ 19 (Int'l Bur. 1995) ("*Bureau Order*"). The Bureau declared ACC's permit "null and void" and dismissed the company's assignment application as moot. *Id.* at ¶ 21.

The Bureau's decision was affirmed by the full Commission in an opinion and order adopted October 16, 1995. *Advanced Communications Corp.*, FCC 95-428 (rel. Oct. 18, 1995) ("*Advanced II*" or "Order"). The Commission agreed with the Bureau that "ACC had made little progress in construction, launch, and initiation of a DBS system in the past decade—particularly during its four-year extension—and therefore that an [additional] extension was not justified." *Id.* at ¶ 28 (citing *Bureau Order* at ¶¶ 13-20). It further explained that "ACC's lack of due diligence ha[d] resulted in a warehousing of spectrum from which it [sought] to profit." *Id.* at ¶ 64. Accordingly, the FCC canceled ACC's construction permit and reclaimed its orbital slots and channel assignments. The FCC subsequently auctioned the reclaimed spectrum for hundreds of millions of dollars.

ACC, Tempo, and Primestar ("Appellants") seek review of the Order, asserting a number of claims of which only the following warrant analysis: (1) the decision con-

stituted an arbitrary departure from agency precedent; (2) the FCC failed to provide a reasoned explanation for its decision, which would delay the initiation of new DBS service in contravention of the agency's stated goals; and (3) in deciding whether to grant ACC's extension request, the FCC improperly considered the revenues to be gained from the auction of ACC's orbital slots and channels.

II.

Our review of the Commission's decision is deferential; we will affirm "unless the agency's order was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)).

With this standard in mind, we turn to appellants' contention that the Commission's revocation of its construction permit was an arbitrary departure from settled Commission precedents and policies. Appellants point to ACC's promotional activities in advancing the development of DBS and contend that ACC's efforts to satisfy its permit requirements were no less diligent than those of other DBS permittees whose extension requests had been granted, and that the FCC failed to explain how ACC's performance differed in any relevant respect from that of the permittees in those other cases.

It is elementary that an agency must apply its rules with consistency and may not depart from precedent without a reasoned explanation. *See Channel 51 of San Diego, Inc. v. FCC*, No. 95-1128, 1996 WL 139413 at *4 (D.C. Cir. Mar. 29, 1996) ("an agency must conform to its prior decisions or explain the reason for its departure from such precedent") (quoting *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995)). We are not persuaded, however, that the Order departed from precedent. Although this was the first instance in which the FCC "denied an extension of time to a DBS permittee for fail-

ure to progress toward compliance with the second due diligence requirement," *see Advanced II* at ¶ 26 (emphasis deleted), in reaching that decision the Commission does not appear to have applied its principles in a manner inconsistent with its precedent.

In the Order, the FCC explained that "[w]hile promotional efforts may be laudable, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system. . . ." *Id.* at ¶ 31. This statement is consistent with the Commission's prior decisions, *see, e.g., United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247 at ¶ 17 (1992) (*"USSB II"*) (noting that the "efforts made by USSB to establish its DBS system 'reveal[] no lack of capability or commitment' ") (quoting *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6860 (1988) (*"USSB I"*)); and we find no error in the Commission's conclusion that ACC had failed to demonstrate the required "concrete progress." The only efforts to develop a DBS system during the first extension period that appellants were able to cite were ACC's failed negotiations with EchoStar and its successful negotiation of the CPA. *See* Brief for Appellants at 9-12. The joint venture with EchoStar never came to fruition, and we cannot say that the Commission abused its discretion in failing to credit ACC with the DBS system to be contributed by TCI under the CPA. *See Advanced II* at ¶ 39 ("the CPA cannot fairly be characterized . . . as an arrangement by ACC for the launch, deployment, and operation *of its own* satellite system") (emphasis added). It is readily apparent that ACC's only real contribution to the CPA was its DBS permit and that it would have a trivial involvement, if any at all, with the resulting system.

We reject appellants' contention that the decision in the Order is irreconcilable with other decisions in which the Commission has either granted an extension or allowed a transfer of control. To the contrary, the Commission has

articulated sufficiently principled distinctions from these other cases to withstand review. The Order is not inconsistent with *USSB II* (granting second extension and permitting modification of DBS permit to allow use of a satellite) and *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993) (granting second time extension), *recons. den.*, FCC 95-421 (Oct. 5, 1995) ("*Dominion*"). In each of those cases, the DBS permittee had made significantly greater progress in developing its own DBS system than had ACC. *See Advanced II* at ¶ 49 (permittee in *USSB II* had "spent more than $23 million for a portion of a satellite . . . ; arranged to finance the remaining completion and launch costs of the satellite; and . . . executed contracts with various suppliers of DBS home receiving systems"); *id.* at ¶ 25 (permittee in *Dominion* "had developed a financing program, contracted for home receiving equipment, and obtained a contract for launch services").

Directsat Corporation, 10 FCC Rcd 88 (1995), presents a more difficult case. In that decision, the Commission approved the for-profit sale of the permittee's construction permit for an unbuilt DBS system. In the Order, the Commission distinguished *Directsat* on the ground that "unlike ACC, Directsat did not request an extension of its DBS construction permit," *Advanced II* at ¶ 56 (emphasis deleted), and that whereas "Directsat's investment in the development of its DBS system had been substantial, and its progress toward actual implementation had been steady and consistent with the schedule established in its construction contract . . . . [,] ACC has consistently delayed the schedule established in its construction contract," *id.* (internal quotations omitted) (emphasis deleted).

Although we fail to see the relevance of the first distinction, *see* Dissenting Statement of Commissioner James H. Quello at 4, reprinted in Joint Appendix at 46 (it was apparent at the time Directsat filed its transfer application that an extension would be required; and an extension was,

in fact, later requested), we find the second both relevant and persuasive. One of the primary purposes of the due diligence rules is to prevent the "warehousing" of spectrum. *See Directsat,* 10 FCC Rcd at 89 ¶ 4 (due diligence rules "deter permittees from seeking to delay or postpone construction with the expectation that the permit would . . . become more valuable and could be sold at an increased price for profit"). The Commission may reasonably conclude that a permittee that makes steady and consistent progress towards the construction of its DBS system is less likely to be "warehousing" its spectrum than one whose progress is, at best, irregular. Directsat met its construction schedule while ACC regularly missed its promised construction deadlines and payments to its satellite contractor.

Next, we reject appellants' claim that the Order should be vacated because the Commission "failed to supply a reasoned explanation for its abrupt departure from [the Commission's] stated goal of ensuring the prompt initiation of DBS service." Brief for Appellants at 43. While the timely initiation of such service is one of the Commission's primary goals, that has never been the sole criterion used to determine whether an extension should be granted to a DBS permittee. Rather, the Commission has considered "[t]he totality of the circumstances—those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, *and* the ultimate goal of service to the public." *USSB II,* 7 FCC Rcd. at 7249, ¶ 15 (quoting *USSB I,* 3 FCC Rcd at 6859) (emphasis added). Although enforcement of the due diligence rules may cause delays in the provision of a particular DBS system, the Commission's anti-warehousing policy relies on the enforcement of its due diligence obligations; otherwise, it could not ensure the prompt delivery of DBS service as a general matter. Taken to its logical conclusion, appellants' argument would deny the FCC the ability to revoke a DBS permit irrespective of the permittee's lack of due diligence if the

revocation would delay the provision of a given DBS service. Such a result is patently untenable.

Finally, we address appellants' contention that the FCC violated 47 U.S.C. § 309(j)(7)(A) by allowing the "expectation of Federal revenues [to play] a large role in [the] decision to deny [ACC's] application." Brief for Appellants at 24 (internal quotations omitted). While the Commission was aware that substantial sums could be realized from the sale of any orbital slots and channels recovered from ACC, *see Advanced II* at ¶ 67 n.127 (acknowledging the pledge by MCI to open bidding at $175 million in the event an auction were held), the Order does not base its denial of ACC's renewal application on the expectation of such revenues. Rather, the Commission's decision was predicated on ACC's failure to achieve "any concrete progress toward the actual construction and operation of its DBS system" during its first extension period. *Id.* at ¶ 37. Appellants are thus asking us to search beyond the text of the Order to find some alleged illicit motivation on the part of the FCC. This we are unwilling to do. "Agency opinions, like judicial opinions, speak for themselves," *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); and appellants have pointed to nothing in the record that is sufficient to overcome the "strong presumption of agency regularity." *Louisiana Ass'n of Indep. Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992). Of course, we express no opinion as to whether the Commission was in fact barred by law from taking into account the expected impact on federal revenues.

APPENDIX B

[Filed Jun. 27, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1551

ADVANCED COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Intervenors

Consolidated with 95-1560, 95-1561

BEFORE: Buckley, Williams and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed June 6, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Jun. 27, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1551

ADVANCED COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Intervenors

Consolidated with 95-1560, 95-1561

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of Appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this order.

APPENDIX C

FCC 95-428

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF
ADVANCED COMMUNICATIONS CORPORATION

File Nos. DBS-94-11EXT

APPLICATION FOR EXTENSION OF TIME TO CONSTRUCT, LAUNCH, AND OPERATE A DIRECT BROADCAST SATELLITE SYSTEM

DBS-94-15ACP

APPLICATION FOR CONSENT TO ASSIGN DIRECT BROADCAST SATELLITE CONSTRUCTION PERMIT FROM ADVANCED COMMUNICATIONS CORPORATION TO TEMPO DBS, INC.

DBS-94-16MP

APPLICATION FOR MODIFICATION OF DIRECT BROADCAST SATELLITE SERVICE CONSTRUCTION PERMIT

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1995 Released: October 18, 1995

By the Commission: Commissioners Quello and Barrett dissenting and issuing separate statements; Commissioners Ness and Chong issuing separate statements.

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I. INTRODUCTION

1. Before us are several Applications for Review of a Memorandum Opinion and Order issued by the International Bureau that: (1) denied Advanced Communications Corporation ("ACC") an extension of time in which to construct, launch, and operate its Direct Broadcast Satellite ("DBS") system; and (2) dismissed as moot ACC's applications for consent to assign its DBS construction permit to Tempo DBS, Inc. and to modify its permit to conform to the specifications of satellites currently under construction for Tempo Satellite, Inc.[1] Tempo Satellite is an affiliate of Tempo DBS and a current DBS permittee; both Tempo Satellite and Tempo DBS are wholly owned by Tele-Communications, Inc. ("TCI"), the country's largest cable multiple systems operator ("MSO"). These Applications for Review have been opposed by a number of parties, including most other DBS permittees.

2. We affirm the International Bureau's finding that ACC failed to meet its due diligence obligation of proceeding expeditiously with construction and launch of its DBS system. In 1984, the Commission assigned to ACC scarce public resources—orbital positions and channels—at no cost, requiring only that ACC proceed with due diligence to provide the DBS service it had promised. As the Bureau found, after more than a decade, including one four-year extension of time, ACC has not met the Commission's due diligence standards. Accordingly, we affirm the Bureau's decision to cancel ACC's construction permit. Because we deny the extension requested by ACC, its assignment and modification applications have been rendered moot, and thus will be dismissed. The channels and orbital locations previously assigned to ACC will therefore revert to the public for reassignment.

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[1] *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995) ("*Bureau Order*").

3. With this decision, we also announce that before the end of this month we will initiate a rulemaking to establish a new methodology for reassigning DBS channels and orbital positions that become available as a result of either cancellation by the Commission or surrender by permittees. Our thinking at this point is that opening a window for new applications for DBS authorizations for these channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. Since one of our primary goals is to expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable, we intend to meet the following timetable:

October 27, 1995	Notice of Proposed Rulemaking issued
December 12, 1995	Final Report & Order issued
January 17, 1996	New rules become effective
January 18, 1996	Channels reassigned; if competitive bidding chosen, auction begun and completed in one day

This is an ambitious timetable, but we are committed to achieving an expedited reassignment in order to minimize or avoid altogether any disruption in the development of the DBS service or in the business plans of those eager to participate in that development. By devising and implementing a system for reassigning ACC's channels within three months, we will resolve the reassignment issue in time for any potential recipient of those channels to proceed with its business plans with little or no interruption.

4. In making this decision, we also deny a request by EchoStar Satellite Corporation for an investigation of and sanctions for alleged improper and undisclosed *ex parte*

contacts in this proceeding.[2] Since the prohibited *ex parte* presentations were promptly disclosed once their significance became known, and since the arguments made in those presentations have been raised by petitioners in this proceeding and fully addressed by EchoStar and other opponents, we conclude that no harmful prejudice has occurred.

II. BACKGROUND

A. *The Evolution of the DBS Service*

5. In 1982, we granted the first authorizations for DBS service—satellite systems that would deliver video programming "direct to home" via backyard receiving dishes.[3] Our primary goals in initiating this new service were to provide additional competition to existing program providers such as cable television, to provide improved service to remote areas of the country, and to encourage innovative new programming and services.[4] DBS operators would transmit satellite signals from one or more of the eight orbital positions allocated to the United States pursuant to the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83").[5] Thirty-two channels were available for

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[2] In both its Opposition and in a June 13, 1995 letter to the Managing Director, EchoStar requested, *inter alia*, an investigation into whether additional undisclosed prohibited *ex parte* communications had occurred in the proceeding, and for imposition of sanctions against those who have already admitted to making such prohibited communications.

[3] *Direct Broadcast Satellite Service*, 90 F.C.C.2d 676 (1982). DBS is a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, relatively inexpensive earth terminals.

[4] *Id.* at 680-82.

[5] *See Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 F.C.C.2d 250 (1983) ("*DBS Processing Order*"). The Region 2 Plan adopted at RARC-83 allocates orbital positions and channels for use in the Broadcast Satellite Service

use at each orbital location. With digital compression, each such "channel" currently can yield up to six channels of consumer programming.

6. Pursuant to our DBS rules and in lieu of stringent financial showings and subsequent Commission analysis, each DBS permittee must satisfy a two-prong due diligence requirement before a DBS license can be awarded.[6] The first prong of our due diligence requirement mandates that each DBS permittee must begin construction or complete contracting for construction of its system within one year of grant of its construction permit. The second prong requires that each permittee must begin operation of its system within six years after receipt of its construction permit. Specific orbital positions and channels are assigned on a first-come, first-served basis upon a determination that the permittee has satisfied the first prong contracting requirement. Thus, specific orbital/channel assignments are made in the order that first-prong due diligence demonstrations are received from permittees.[7] These requirements were intended to permit more orderly processing of applications and to ensure prompt and effective use of DBS spectrum resources.[8]

7. There have been five processing rounds for DBS applicants, the last in 1989. Prior to the last processing

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("BSS") in the Western hemisphere. The eight U.S. orbital positions, proceeding from east to west, are 61.5°W.L., 101°W.L., 110°W.L., 119°W.L., 148°W.L., 157°W.L., 166°W.L., and 175°W.L.

[6] *See* 47 C.F.R. § 100.19(b); *Direct Broadcast Satellite Service*, 90 F.C.C.2d at 719.

[7] *DBS Processing Order*, 95 F.C.C.2d at 253. Permittees apply separately for launch and operational authority once satellite construction is nearly complete. A license to operate a DBS satellite, for a five-year term, may be granted upon successful satellite launch and operation of the DBS service. *See, e.g., Hughes Communications Galaxy, Inc.*, DA 95-979 (May 1, 1995).

[8] *DBS Processing Order*, 95 F.C.C.2d at 253; *see also CBS, Inc.*, 99 F.C.C.2d 565, 568 (1984).

round, the limited number of applicants and channels requested, coupled with the flexibility of the international allocation of DBS resources in the Region 2 Plan, allowed us to grant authorizations at variance with that plan.[9] In the last round of DBS applications, however, requests for orbital/channel resources exceeded the available supply. In our 1989 order in *Continental,* we decided to assign half-CONUS[10] channels only in east/west pairs, so that each applicant could provide full-CONUS service. Service to the eastern half of the United States was to be provided from our eastern orbital locations, and service to the western half of the country was to be provided from the four western locations. Accordingly, beginning in 1989, new applicants received paired east/west assignments, and existing construction permits were modified to comply with the new assignment scheme. However, we authorized conditional full-CONUS coverage from the eastern orbital positions, provided that such service proved feasible and in keeping with United States treaty obligations.[11]

B. *ACC's History as a DBS Permittee*

8. In 1984, we granted a six-year DBS construction permit to ACC, subject to the condition that it "proceed with the construction of its system with due diligence as

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[9] For example, we had authorized the operation of two satellites at the same orbital location, with one satellite serving the eastern part of the country and one serving the western part of the country. *See Continental Satellite Corp.,* 4 FCC Rcd 6292, 6293 (1989), *partial recon. denied,* 5 FCC Rcd 7421 (1990) (*"Continental"*).

[10] Signals from DBS satellites that cover half of the continental United States are referred to as "half-CONUS" signals; those that cover the entire continental United States are referred to as "full-CONUS" signals.

[11] *Continental,* 4 FCC Rcd at 6292-93. At that time, the Commission did not have the resources necessary to determine whether full-CONUS service could be provided in technical compliance with the Region 2 Plan. *Id.*

defined in Section 100.19 of the Commission rules." [12] In 1986, we determined that ACC had satisfied the first prong of the due diligence requirement by contracting for the construction of two satellites.[13] Accordingly, we granted ACC's request for 16 channels at each of two orbital locations: 110° and 148°.[14] In a 1986 application to modify its construction permit, ACC requested assignment of additional channels at these locations. Pursuant to the assignment scheme adopted in *Continental*, we reserved (but did not assign) eleven additional pairs of channels for ACC, conditioned upon ACC's satisfaction of the first prong contract due diligence requirement for this modified DBS system.[15]

9. In October 1989, ACC submitted satellite contract information in compliance with the first due diligence requirement for its modified system. In 1990, ACC requested a four-year extension of time, until December 7, 1994, to construct and operate its DBS system. ACC cited "factors outside its control" in support of its extension request: (1) that designs made obsolete by technological advances necessitated numerous modifications; and (2) that changes and uncertainty in the Commission's channel allocation policy had delayed construction. ACC said that it had nonetheless spent "considerable" energy and funds in advancing satellite technology, including DBS digital technology.[16]

10. In April 1991, we granted ACC's extension request and assigned ACC 11 additional channels at 110°

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[12] *Satellite Syndicated Systems, Inc.*, 99 F.C.C.2d 1369, 1387 (1984).

[13] *Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21-22 (1986) ("*Tempo I*").

[14] *Continental*, 4 FCC Rcd at 6304 n.42.

[15] *Id.* at 6301. Thus, the Commission held 11 additional pairs of channels for ACC, which would be given specific assignments if and when ACC demonstrated contracting due diligence with respect to those new channels.

[16] Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01EXT/88-05MP (filed Feb. 16, 1990).

and 8 additional channels at 148°, based on our determination that it had satisfied the first prong contracting due diligence requirement for its modified system.[17] The due diligence finding was based in part on ACC's contract payment schedule, under which it would have paid 14% of the total contract price by January 1992, 58.5% of the contract price by April 1993, and 83.5% of the contract price by January 1994, at which time its first satellite was scheduled for delivery. In granting the extension request, we specifically stated that "[*i*]*n the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization,*" and noted that "*there does now appear* [*to be*] *a need for stricter enforcement of the construction progress requirements of the DBS rules.*"[18]

11. In August 1994, just four months before its construction permit was to expire, ACC requested a second four-year extension of time, based on the following assertions: (1) its three-year negotiation to reach a joint venture agreement; (2) modifications in its system design that delayed construction; (3) the "considerable" funds and "countless" hours expended to implement its system; and (4) regulatory delays in formulating channel assignment policy in *Continental* which affected the timing of the grant of ACC's modification requests.[19]

12. Seven weeks later, or just two months before its permit was to expire, ACC requested consent to assign

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[17] *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2272 (1991), *recon. denied*, 6 FCC Rcd 6977 (1991) ("*Advanced*"). We assigned only eight channels at 148° since no more were available at that location. We denied ACC's request for three channels at 157° because ACC did not complete contracting for a fifth satellite at this location. *Id.* Three channels remain reserved for ACC but not yet assigned.

[18] *Id.* at 2274 (emphasis added).

[19] Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01/94-11EXT (August 8, 1994).

its DBS construction permit to Tempo DBS,[20] which would in turn lease or sell the transponders at the 110° orbital position to Primestar Partners L.P.[21] The proposed assignment would permit Primestar's migration from medium-power direct-to-home fixed satellite service ("FSS") using approximately 36 to 40 inch receiving dishes, to high-power DBS service using 18 inch receiving dishes.[22]

13. In anticipation of this assignment, ACC also filed an application to modify its permit to conform to the specifications of two satellites being built under Tempo Satellite's DBS permit for an eleven-channel DBS system to be operated at 119° orbital location.[23] The practical effect of this request is that neither ACC nor Tempo DBS would build the two satellites ACC had contracted to purchase from Martin Marietta that had been the basis for ACC's due diligence showings. Instead, ACC or Tempo DBS would use two satellites being built for Tempo Satellite under Tempo Satellite's construction permit. ACC asked the Commission to give it credit for Tempo Satellite's efforts in determining whether ACC had met its due diligence obligations.[24]

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[20] Request for Consent to Assign DBS Authorizations, DBS-94-15ACP (September 28, 1994).

[21] TCI owns twenty-two percent of Primestar. The cable system operators that have ownership interests in Primestar are TCI, Time Warner, Inc., Cox Enterprises, Comcast Cable, Continental Cablevision, and Newhouse Broadcasting Corporation. GE American Communications, Inc., which owns the satellite that is currently used to provide Primestar service, is also an equity partner in Primestar. *See United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994).

[22] Tempo DBS App. for Review at 22.

[23] Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994). In November 1994, ACC filed an amendment to this modification request. Amendment of Application for Modification of Construction Permit, DBS-94-16MP (November 16, 1994).

[24] *See, e.g.*, ACC's Consolidated Opp. to Petitions to Deny at 15-18 (filed Nov. 23, 1994).

14. Included with ACC's assignment application was a Capacity Purchase Agreement ("CPA") between ACC and TCI. Under the CPA, TCI would provide ACC with the two satellites being built for Tempo Satellite, and pay over $45,000,000 in TCI common stock along with other monetary incentives. In return, ACC would irrevocably sell all of its rights to the transponder capacity on those satellites. This agreement was an alternative to the outright assignment of ACC's construction permit to Tempo DBS.[25]

15. In April 1995, the International Bureau found that ACC had failed to comply with its due diligence obligations, and therefore denied ACC's request for extension of time to begin DBS operations.[26] The Bureau concluded that ACC's failure to make any significant progress toward the launch and operation of its DBS system was the result of ACC's own business decisions, and that ACC also could not rely upon Tempo Satellite's investment in its satellites to satisfy ACC's due diligence obligations. Accordingly, ACC's DBS construction permit was cancelled, and its requests to assign and modify its permit were deemed moot.[27] ACC and others have filed Applications for Review of that decision by the Commission,[28] and these applications are opposed.[29]

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[25] ACC App. for Review at 19; Tempo DBS App. for Review at 8 n.4, 6 n.10.

[26] Bureau Order at ¶¶ 9-19.

[27] *Id.* at ¶¶ 20-21.

[28] The following parties filed Applications for Review ("App. for Review") on May 22, 1995: ACC; Tempo DBS, Inc.; Primestar Partners L.P.; General Instruments Corporation ("GIC"); and Cable Telecommunications Association ("CATA"). Some or all of these parties may be collectively referred to as "petitioners."

[29] Dominion Video Satellite, Inc. filed an Opposition ("Opp.") to the Applications for Review on May 26, 1995. The following parties filed Oppositions on June 6, 1995: EchoStar Satellite Corporation; Directsat Corporation; DIRECTV, Inc.; MCI Telecom-

16. DIRECTV asserts that CATA, GIC, and Primestar lack standing in this proceeding. None of these petitioners participated in the first stage of this proceeding. In such circumstances, Section 1.106(b)(1) of our rules, 47 C.F.R. § 1.106(b)(1), requires that they "show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." These three petitioners have not made this showing, and their respective applications for review will be dismissed. All of their arguments have been raised by the other petitioners, however, and so are addressed in full.

III. DISCUSSION

17. In support of their Applications for Review, petitioners argue, as detailed below, that the *Bureau Order*: (1) exceeds the Bureau's delegated authority; (2) conflicts with Commission precedent for considering due diligence and requests for extension of time; and (3) contravenes the Commission's goal of prompt initiation of competitive DBS service.[30] To the contrary, we find that the Bureau did not exceed its delegated authority, and it correctly applied Commission precedent in holding that ACC had failed to meet its due diligence obligations.

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munications Corporation; Entertainment Made Convenient (Emc^3) U.S.A., Inc.; Consumer Federation of America and the Center for Media Education; and the National Rural Telecommunications Cooperative. United States Satellite Broadcasting Company ("USSB") also filed Comments on the same date. Others filed informal comments in this proceeding as well. Some or all of these parties may be collectively referred to as "opponents." Also, as noted above, on June 13, 1995, EchoStar requested that the Managing Director undertake an investigation to determine whether any additional *ex parte* communications not permitted under our rules had occurred, and requested that sanctions be imposed against those who had admittedly engaged in prohibited presentations. The Managing Director has referred this matter to the full Commission. We address this matter in ¶¶ 75-79, *infra*.

[30] ACC App. for Review at 11, 18; Tempo DBS App. for Review at 11-24.

A. *Due Diligence Obligations*

1. Delegated Authority.

18. Petitioners contend that the Bureau exceeded its delegated authority in denying ACC's application for an extension of time.[31] They assert that the *Bureau Order* constitutes an "unprecedented and inexplicable" break with Commission precedent, since it is the first time that a DBS construction permit has been cancelled based on a permittee's failure to meet the second prong of the due diligence rule.[32] For the reasons stated below, we find that the Bureau's action was consistent with our precedent.[33]

19. At the inception of DBS service, the Commission established a minimal number of rules designed to foster the development of the fledgling service.[34] The Commission determined that the public interest would best be served by affording DBS permittees maximum flexibility in order to facilitate the introduction of a new service that

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[31] Pursuant to Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, the Chief of the International Bureau is delegated a wide range of authority to perform most of the functions of the bureau, which include "administer[ing] policies . . . [for] domestic and international satellite systems" and "monitor[ing] compliance with the terms and conditions of authorizations" such as those at issue in this proceeding. *See* 47 C.F.R. § 0.51(c)-(d). This delegated authority is subject to specific limitations that preclude action on applications that present novel questions of fact, law, or policy that cannot be resolved under outstanding precedents or guidelines, or that appear to justify a change in Commission policy. *Id.* at § 0.261(b).

[32] *See, e.g.*, ACC App. for Review at 1, 12-14; Tempo DBS App. for Review at 11-13.

[33] In addition, we note that since we are now deciding this case on the merits, the issue of whether the Bureau exceeded its delegated authority is moot.

[34] There are only nine regulations directly applicable to DBS service. *See* 47 C.F.R. Part 100.

was untried and unproven, both technically and financially.[35] Among the few rules imposed was the two-part due diligence requirement, to which exceptions would be allowed only in the "most extraordinary circumstances." [36]

20. Under the first prong of our due diligence rule, we have taken action against applicants who failed to go forward with the construction of a DBS system. Since the rule "was intended to ensure the prompt initiation of DBS service for the public," we said that it "must be enforced where permittees are allowed to hold spectrum resource for which other applicants exist." [37] As a result, between 1984 and 1989, a total of seven permittees were stripped of their permits for failure to comply with the first due diligence requirement.[38] In addition, we recently cancelled the orbital positions and channels (but not the construction permit) assigned to Dominion Video Satellite, Inc. for failure to demonstrate compliance the first due diligence requirement in a timely manner.[39]

21. Nevertheless, throughout the first decade of DBS's existence—what we have previously described as the "pioneering era" of this service [40]—the Commission exercised flexibility where the public interest so required. The Commission was reluctant to cancel construction permits for failure to initiate DBS service "in accord with a pre-

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[35] *Direct Broadcast Satellite Service*, 90 F.C.C.2d at 706-08.

[36] *DBS Processing Order*, 95 F.C.C.2d at 254.

[37] *CBS, Inc.*, 99 F.C.C.2d at 571-72.

[38] *See CBS, Inc.*, 99 F.C.C.2d at 566, 571-73 (CBS and Graphic Scanning Corp.); *Tempo I*, 1 FCC Rcd at 21 (NEXSAT); *RCA American Communications, Inc.*, 2 FCC Rcd 1204, 1205 (1987) (RCA Americom, Antares Satellite Corp., and Digital Paging of Texas, Inc.); *Continental*, 4 FCC Rcd at 6296 (1989) (DBSC).

[39] *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680, 6687 (1993), *recon. denied*, FCC No. 95-421 (Oct. 5, 1995) (*"Dominion"*). The *Dominion* decision is discussed more fully in ¶ 25, *infra*.

[40] *E.g., Advanced*, 6 FCC Rcd at 2274.

established timetable set without the benefit of experience."[41] For example, in granting ACC's first four-year extension, we based our decision on the substantial developments in DBS satellite technology, the Commission's development of its policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's.[42] Such factors, which would have been outside any permittee's control, were the type of "extraordinary circumstances" that justified extension.

22. But even as we granted such extensions, we separately cautioned that extensions would be more difficult to obtain in the future. We noted that:

> [a]s circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource, there does now appear [to be] a need for stricter enforcement of the construction requirements of the DBS rules.[43]

We stated that it is "imperative that inefficient use of DBS assignments, whether intentional or inadvertent, be prevented, particularly if it becomes evident that incumbent permittees are unjustifiably preventing additional promising parties from attempting to deliver DBS services."[44] We also explicitly put permittees on notice that uncertainties in or miscalculations of the business climate are not factors beyond permittees' control that could justify an extension, but rather are risks that each permittee must bear alone: "[n]either other existing or potential DBS participants nor the Commission can, or should be

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[41] *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6860 (1988) (*"USSB I"*).

[42] *Advanced*, 6 FCC Rcd at 2274.

[43] *USSB I*, 3 FCC Rcd at 6861 (quoted in *Advanced*, 6 FCC Rcd at 2274).

[44] *Id.*

expected to, accommodate their mistaken projections or modified expectations." [45]

23. Four years ago, we said that "DBS continues to be 'unproven as a technology and as a commercial enterprise.' " [46] In granting ACC's request for a four-year extension that year, however, we explicitly warned that "[t]here will soon come a time when the pioneering era of the development of DBS technology and service will come to an end." [47]

24. The last four years have ushered in that new era. Two permittees (DIRECTV [48] and USSB) already have their DBS systems in operation, and a third (EchoStar/Directsat) is to launch one satellite this fall and another in 1996. Tempo Satellite is scheduled to launch in June 1996. Under these circumstances, a permittee's inability or unwillingness to proceed with construction of its system weighs even more heavily against allowing it to retain its permit.[49]

25. ACC argues that the Commission has applied a "flexible policy" as recently as 1993, when we issued our *Dominion* order.[50] In that order, we stripped Dominion of its orbital/channel assignments because of its failure over a two-year period to respond to one Commission order and several requests from the staff for information

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[45] *Id.* at 6859.

[46] *Advanced,* 6 FCC Rcd at 2273 (quoting *USSB I,* 3 FCC Rcd at 6859).

[47] *Id.* at 2274.

[48] DIRECTV is a wholly-owned subsidiary of GM Hughes Electronics and an affiliate of Hughes Communications Galaxy, Inc. ("Hughes"). Hughes is a Commission licensee in the high-power DBS service, and DIRECTV is the DBS operating, customer service, and programming acquisition arm of Hughes. Both Hughes and DIRECTV are subsidiaries of General Motors.

[49] *See USSB I,* 3 FCC Rcd at 6858.

[50] *See* ACC App. for Review at 15.

necessary to demonstrate compliance with the first due diligence requirement.[51] Dominion's inordinate delay in submitting the required information caused a prejudicial delay of assignments to other DBS permittees who were behind it in the assignment queue. The appropriate sanction in that situation was revocation of Dominion's assignments and sending it to the end of the assignment queue. In the same order, we also extended Dominion's DBS permit based on the "reasonable degree of continuity in [Dominion's] efforts to establish its DBS system."[52] We noted that Dominion had developed a financing program, contracted for home receiving equipment, and obtained a contract for launch services—all part of satisfying the *second* prong of due diligence.[53] None of the demonstrated progress toward an operational DBS system that justified our flexibility in *Dominion* is present in this case.

26. It is true, however, that the Commission has never denied an extension of time to a DBS permittee for failure to progress toward compliance with the *second* due diligence requirement.[54] From this, ACC argues that any decision to take such an action would be an "unprecedented and inexplicable" departure from Commission precedent.[55]

27. We disagree. Consistency with prior precedent is not determined by whether the same *outcome* has been reached. Rather, it is determined by whether the Com-

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[51] *Dominion*, 8 FCC Rcd at 6687.

[52] *Id.* at 6688.

[53] *Id.*

[54] The *Bureau Order* erroneously stated that certain language quoted from *USSB I* was used in *denying* an extension to another DBS permittee. *See Bureau Order* at ¶ 13 (quoting *USSB I*, 3 FCC Rcd at 6859). This misstatement does not detract from the logic of the order, which was based on the Commission's often-expressed desire for stricter enforcement of due diligence requirements, rather than the outcome of any particular case.

[55] *See* ACC App. for Review at 1.

mission's rules and orders have been applied faithfully. We have repeatedly expressed our commitment to enforcing the due diligence rules. The fact that others have demonstrated sufficient commitment to justify extensions does not require us to grant *every* such request. As we explain below, if warranted under the circumstances of this case, we do not consider it a departure from precedent to cancel a DBS construction permit based on the permittee's failure to demonstrate sufficient progress toward compliance with the second prong of the due diligence requirement. We now turn to the question of whether the facts of this case justify cancellation of ACC's permit.

2. Application of the Due Diligence Standard

28. As we stated in granting ACC its first extension, "[t]he Commission closely scrutinizes all requests for extensions of time within which to comply with its rules and policies." [56] In ruling on a request for extension of time, the Commission must assess the totality of circumstances: "those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." [57] The Bureau concluded from its assessment of the totality of the circumstances that ACC had made little progress in construction, launch, and initiation of a DBS system in the past decade—particularly during its four-year extension—and therefore that an extension was not justified.[58] Upon close scrutiny of ACC's extension request, we conclude that the Bureau was correct.

29. ACC contends that it has not been "warehousing" its DBS authorizations. ACC has focused its argument upon three areas: (1) the efforts made by ACC in de-

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[56] *Advanced*, 6 FCC Rcd at 2274.

[57] *USSB I*, 3 FCC Rcd at 6861.

[58] *Bureau Order* at ¶¶ 13-20.

veloping its DBS system; (2) the agreement between ACC and TCI for construction and launch of a satellite licensed to ACC; and (3) ACC's negotiations for a joint venture with another DBS permittee, EchoStar. In addition, ACC asserts that the circumstances of this case are indistinguishable from those of two other cases in which the Commission either granted an extension or allowed a transfer of control.[59]

a. ACC's Efforts

30. ACC argues that the Commission should consider its efforts "to make DBS a reality," including: (1) the promotion of digital transmission technology; (2) the development of plans to provide educational programming; (3) advocacy of interactive service by DBS systems; and (4) participation in legislative, regulatory, and publicity efforts to promote the development of DBS.[60]

31. For purposes of our due diligence analysis, we must recognize that *none* of the efforts cited by ACC involves the actual construction of a DBS satellite or arrangement for launch- and operation-related services. While promotional efforts may be laudable, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system that is required under our rules.

32. In the past, we have specifically deemed such generalized efforts toward promoting the DBS service insufficient to satisfy the first due diligence prong. For example, although we "recognize[d] the efforts CBS has made to date in developing DBS and HDTV technology," we held that CBS had not met its due diligence obligation for the simple reason that it did not have a signed contract

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[59] *Id.* at 19-20 (citing *United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247 (Vid. Svc. Div. 1992) (*"USSB II"*) and *Directsat Corp.*, 10 FCC Rcd 88 (1995)). These cases are discussed *infra*, ¶¶ 46-63.

[60] *Id.* at 6-8.

for the construction of its satellite.[61] Similarly here, without demonstrated concrete progress toward construction and operation of a DBS system, we cannot say that the initial assignment of scarce public resources to ACC continues to be justified.

33. Since 1991, when we cautioned ACC and all other permittees that extensions would be more difficult to obtain in the future,[62] we have granted extensions on only two occasions. The record in those cases demonstrated that the permittees had made significant progress toward the realization of a DBS system, including substantial monetary investment, arranging for financing for completion and launch of the system, contracting with suppliers of DBS home receiving equipment, and contracting for satellite launch services.[63] These are the kinds of indicia of progress that we look for in evaluating an extension application. Neither these nor any comparable indicia are present in this case.

34. ACC asserts that it was the first to advocate the implementation of digital transmission technology, which it began to incorporate into planning for its system as early as 1986.[64] ACC seeks credit for persevering in its efforts to drag the industry to this higher standard, noting the resistance of other permittees such as DIRECTV that ultimately came to adopt the same technology.[65] We do not disparage these efforts. It is more notable, however, that DIRECTV, which originally opposed this technology, had sufficient time since we approved ACC's use of digital technology in 1991 not only to change its design to incorporate digital transmission, but also to construct and

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[61] *CBS, Inc.*, 98 F.C.C.2d at 1069.

[62] *See Advanced*, 6 FCC Rcd at 2274.

[63] *See Dominion*, 8 FCC Rcd at 6688; *USSB II*, 7 FCC Rcd at 7251.

[64] ACC App. for Review at 6.

[65] *Id.* at 6-7.

launch a satellite based on that design.[66] During the same three year period, ACC—which by its own admission had a five-year head start—failed to progress toward the realization of its DBS system.

35. ACC also argues that the Bureau erroneously ignored ACC's continued compliance with the first due diligence requirement.[67] In order to satisfy the first prong of the due diligence requirement for its first 16 paired channels, ACC submitted a construction contract that provided for complete construction of its two satellites by December 1990 and June 1991, respectively.[68] After our order in *Continental*, ACC filed a due diligence showing for its 11 additional paired channels in October 1989 that provided for completion of its first satellite by June 1993, which six months later was revised to January 1994.[69] But in May 1993, ACC submitted an amended contract with an updated timetable showing that construction on its first satellite would not begin until October 1993 (almost three years after it was originally supposed to be finished), with progress payments stretching until approximately September 1995.[70] In April 1994, ACC submitted yet another amended contract that set April 1995 (four and a half years after the original *completion* date) as the new date for *beginning* construction, with progress payments stretching until March 1998.[71] ACC states that it

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[66] *See* Hughes' Application for Minor Modification of Construction Permit and Technical Showing Regarding Compliance with International Requirements, FCC File No. DBS-91-02MP/Minor (July 15, 1991); *Hughes Communications Galaxy, Inc.*, 8 FCC Rcd 8116 (1993) (launch authorization).

[67] ACC App. for Review at 12.

[68] *See Tempo I*, 1 FCC Rcd at 21.

[69] *See* ACC Semi-Annual Report (dated April 4, 1990); *Advanced*, 6 FCC Rcd at 2270-72.

[70] *See* ACC Semi-Annual Report (dated May 10, 1993).

[71] *See* ACC Semi-Annual Report (dated April 27, 1994).

paid some still undisclosed amount for the "Systems Design and Definition Phase," nonetheless it has not made any progress payments for actual construction. Meeting the first due diligence requirement does not justify failing to fulfill the second. Otherwise, permittees could extend indefinitely their nonperformance by repeated modifications of their proposals. As we previously advised ACC, "construction must begin at some point." [72]

36. In granting ACC its first four-year extension, we recognized that practical impediments beyond ACC's control justified flexibility. However, as ACC acknowledges, it has had at least three years since the Commission definitively established the orbital locations and technical parameters of ACC's permit.[73] ACC has cited no factors outside its control to explain its lack of significant progress toward construction and launch of its satellites over that period, which comprised almost all of the four-year extension we previously granted. Due to its extended inaction and apparent lack of commitment to operating its own system, ACC is not "much closer to the threshold of providing service than any non-permittee," and thus has no claim to any comparative advantage that could justify an extension.[74]

37. The bottom line is that ACC has not achieved any concrete progress toward the actual construction and operation of its DBS system. While its other activities may be laudable, our precedent makes it clear that diligent progress toward actual operation which must be the touchstone for our analysis of whether to grant an extension.

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[72] *Tempo I*, 1 FCC Rcd at 20.

[73] *See* ACC App. for Review at 9-10.

[74] *See USSB I*, 3 FCC Rcd at 6860. ACC's reliance on the CPA to support its "threshold" argument is specious; any other entity that had been assigned ACC's channels and orbital locations could enter into the same agreement and instantly be just as close to initiating service as is ACC. *See* discussion of the CPA in Section III.A.2.b, *infra*.

b. The ACC/TCI Capacity Purchase Agreement

38. In their Applications for Review, petitioners assert that the Bureau ignored the Capacity Purchase Agreement ("CPA"), which they characterize as a binding contract for the launch, deployment, and operation of satellites by ACC. They further aver that the $250 million spent by Tempo Satellite on the satellites TCI agreed to provide to ACC should be attributed to ACC, and that it is TCI that is contributing to ACC's DBS program—not the other way around.[75]

39. Under the CPA, ACC would not pay for the construction, the launch, or the operation of any DBS satellites. ACC would not own any satellites. Its sole contribution would be the FCC permit. Indeed, the CPA provided for the complete and immediate liquidation and dissolution of ACC upon the consummation of this "sale" of transponder capacity.[76] In these circumstances, the CPA cannot fairly be characterized by petitioners as an arrangement by ACC for the launch, deployment, and operation of its own satellite system.[77]

40. TCI, by contrast, would be responsible for virtually every aspect of the transaction and subsequent operation of the DBS system. Pursuant to the CPA, TCI would pay all costs for the "design, construction, launch, deployment, operation, and insurance of the satellite," and

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[75] *See* ACC App. for Review at 19; Tempo DBS App. for Review at 7-10. The CPA was not submitted as part of original extension application, but rather as part of the assignment application filed seven weeks later—just before the end of its four-year extension.

[76] *See* CPA at § 2.3. Upon dissolution, ACC would transfer its permit to its sole shareholder, Daniel Garner. *Id.* at § 9.1.2.

[77] Some opponents assert that the CPA transaction would result in an unauthorized *de facto* transfer of control from ACC to TCI. *See* DIRECTV Opp. at 11; EchoStar Opp. at 10. Our resolution of this case on due diligence grounds has rendered that contention moot, and therefore we do not reach it.

would be its actual owner.[78] TCI would also be responsible for arranging and paying for appropriate facilities for tracking, telemetry, and control ("TT&C") of the satellite, and for performance of the TT&C functions once in operation.[79]

41. ACC's assertion that the CPA demonstrates significant progress toward *its* construction and operation of *its* DBS system is not persuasive. The staff correctly focused on the fact that ACC's sole contribution to this DBS system appears to be its authorization to use public resources. *Bureau Order* at 6 n.24. ACC will have no part in the ongoing operation of the DBS system that will use its 27 channels at the 110° orbital location. Not only has ACC contracted away all control over the use of those channels as part of the CPA,[80] but it has also agreed to immediately dissolve as part of the transaction. Moreover, the two satellites for which ACC seeks due diligence credit are currently part of Tempo Satellite's due diligence progress toward construction and operation of *its* DBS

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[78] *See* CPA at §§ 3.1, 3.3. The CPA provides that TCI's services in construing and operating the satellites are "subject to ACC's ultimate control as holder of the FCC Authorization." *Id.* This does not lessen the inference that TCI, and not ACC, was to be responsible for paying for and providing virtually all relevant aspects of DBS operations.

[79] *Id.* at § 3.4. In addition to providing one or more satellites and all related services necessary to their operation, TCI also agreed to: (1) make a non-refundable payment to ACC's sole shareholder, Daniel Garner, in the amount of $600,000; and (2) deliver to ACC certificates representing 2,000,000 shares of Class A common stock of TCI, with a current market value in excess of $45,000,000. *See* CPA at Recital C and § 2.2. TCI also made an interest-free loan of $2,000,000 to Garner, and has been paying him $30,000 per month since October 1994 for his services as a consultant. *See* ACC Agreement and Plan of Reorganization at § 3.4; Consulting Agreement at § 2(a).

[80] *See* CPA at § 2.1.

system.[81] This agreement cannot be characterized as a demonstration of *ACC's* due diligence.

42. ACC also faults the Bureau for considering the extension request apart from the modification application and the assignment application, since the Commission assertedly "eschewed such a piecemeal approach" in *USSB II*.[82] ACC's argument ignores a critical part of our reasoning in *USSB II*. Although the Commission found that granting USSB's extension and modification requests would serve the public interest, in order to grant them we first had to determine that USSB was in compliance with its due diligence obligations.[83] Here, in contrast, the Bureau conducted its compliance analysis first, and its conclusion obviated the need for any further inquiry into the merits of the modification and assignment applications. This approach conforms fully with the Commission's long-standing policies on assignment of authorizations.[84] In any event, reliance upon the proposed assignment to justify an extension would be futile, since our rules in the DBS service specifically provide that "[t]ransfer of control of the construction permit shall not be considered to justify extension of these [due diligence] deadlines."[85]

c. Negotiations with EchoStar

43. ACC also cites as grounds for an extension its efforts from early 1992 to late 1994 to form a joint venture with another DBS permittee, EchoStar—efforts that

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[81] *See* Tempo Satellite's Semi-Annual Report at 1 (dated May 18, 1995).

[82] *See* ACC App. for Review at 19 (citing *USSB II*, 7 FCC Rcd at 7249).

[83] *USSB II*, 7 FCC Rcd at 7250.

[84] *See Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (1964) (proposed assignment will not be considered until the Commission has determined that the assignor has not forfeited its authorization).

[85] *See* 47 C.F.R. § 100.19(b).

ultimately proved unsuccessful.[86] During those negotiations, ACC initially amended its construction contract to delay the start of construction on its first satellite until October 1993, and then delayed the start date until April 1995.[87]

44. We note that for over three years prior to its extension request, ACC had enough channels in a prime orbital location location to create a robust DBS system.[88] ACC nonetheless made a business decision to put off construction of its own satellites for three years while it negotiated to form a joint venture. That decision was ACC's to make, but it must bear the consequences of its actions in failing to proceed toward the launch and operation of its system during an extended period.

45. As the Bureau noted, the Commission has previously found that on-going negotiations do not justify an extension of DBS due diligence milestones: "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure [to] meet a construction timetable in other satellite services."[89] Accordingly, failed negotiations, and the associated delays they may entail,

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[86] *See* ACC App. for Review at 10-11. In progress reports to the Commission, ACC said, in April 1992, that it was engaged in "serious negotiations" that it expected to complete in "the next month or two." In August 1992, ACC reported it had signed a letter of intent that called for execution of an agreement within sixty days. In October 1992, ACC explained that negotiations were continuing, and in April 1993, stated it expected to reach an agreement within the next month. In May 1993, it reported it was still in "complex negotiations," and in October 1993, it claimed that negotiations were continuing. However, on December 30, 1994, ACC indicated that negotiations had failed.

[87] *See* ¶ 35, *supra*.

[88] DIRECTV operates with 27 channels. USSB, which has 5 channels, operates independently. Of all existing DBS permittees, only DIRECTV has as many channels as ACC.

[89] *USSB I*, 3 FCC Rcd at 6859.

cannot provide any greater justification. These negotiations do not constitute adequate justification for the requested extension.

3. Commission Precedent

46. Petitioners also contend that the denial of ACC's assignment application directly conflicts with Commission precedent approving mergers and buyouts of DBS permittees. Specifically, petitioners argue that our actions in approving the sale of transponders from DIRECTV to USSB,[90] and the transfer of control of a DBS permit from Directsat Corporation to EchoStar,[91] mandate extension of ACC's construction permit. Upon review of these cases, we believe that neither case mandates such a result.

a. USSB II

47. The Commission first granted USSB's DBS construction permit in 1982.[92] In 1988, we granted a four-year extension of that permit.[93] We thereafter determined that USSB had complied with the first prong of the due diligence rules, and in 1990 assigned USSB channels at three orbital positions, including five channels at 101°.[94] On April 30, 1991, we assigned the remaining 27 channels at that orbital position to DIRECTV.[95] In July 1991 —less than three months later—USSB and DIRECTV proposed joint use of a satellite then being constructed for DIRECTV to implement their respective DBS systems. The Commission approved that proposal, including

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[90] *See USSB II*, 7 FCC Rcd at 7250-51.

[91] *See Directsat Corp.*, 10 FCC Rcd 88 (1995).

[92] *See CBS, Inc.*, 92 F.C.C.2d at 64.

[93] *See USSB I*, 3 FCC Rcd at 6859-61.

[94] *United States Satellite Broadcasting Co.*, 5 FCC Rcd 7576, 7577 (1990). USSB also was assigned three channels at 110° and eight channels at 148°. *Id.*

[95] *See Advanced*, 6 FCC Rcd at 2270.

the requested extension and modification of USSB's permit.[96]

48. Petitioners argue that the staff ignored parallels between ACC's requests and the Commission's approval of the USSB/DIRECTV transaction.[97] They say that USSB, like ACC, requested a second extension of time and modification of its construction permit to facilitate a cooperative venture. They say that USSB, like ACC, relied on a satellite planned for use in another permittee's DBS system to initiate its own DBS system. We disagree.

49. First, USSB had made a significant investment in its own DBS system, while ACC had not. Prior to grant of USSB's requests in 1992, USSB had accomplished the following: (1) spent more than $23 million for a portion of a satellite, which constituted approximately forty percent of the price of its five-channel payload on the satellite; (2) arranged to finance the remaining completion and launch costs of the satellite; and (3) executed contracts with various suppliers of DBS home receiving systems.[98]

50. By contrast, ACC's efforts to establish its own DBS system since the grant of its first extension of time have been minimal at best. Payments on ACC's satellite construction contract with Martin Marietta at the time of its application amounted to less than one percent of the contract price.[99] Although the Bureau's ruling relied

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[96] *USSB II*, 7 FCC Rcd at 7251.

[97] *See* ACC App. for Review at 15-16; Tempo DBS App. for Review at 15-16.

[98] *USSB II*, 7 FCC Rcd at 7250.

[99] ACC Semi-Annual Report (dated May 10, 1993). ACC's semi-annual report dated April 27, 1994, notes that eleven payments have been made; neither this nor any other filing subsequent to May 1993, however, states specific amounts or percentages of the contract price paid. Moreover, under both the CPA and the assignment agreement, TCI is obligated to reimburse any payment made by ACC on its construction contract after September 8, 1994. *See* CPA at § 13.16; Agreement and Plan of Reorganization at § 13.16.

upon ACC's apparent failure to make substantial payment toward construction and operation of a satellite system—and contrasted it with USSB's $23 million investment—ACC has failed to specify how much money it actually invested in the construction of its satellites.[100] Nor has ACC proffered any other contract for launch- or operations-related services under which ACC must make any further investment in its system. ACC's efforts (up to and including its agreements with TCI and Tempo DBS) consisted principally of negotiations for a merger or transfer of its construction permit—rather than development of its own DBS system.

51. Second, with regard to reliance on another permittee, USSB entered a cooperative venture while ACC proposes to dissolve—the two are not the same. USSB constructed and owns part of a satellite and operates its own system independently of DIRECTV, with "full operational control" over the transponders it purchased and "sole discretion" as to the content of the programming to be transmitted over its channels.[101] USSB has constructed its own national broadcast center, initiated and entered into its own contracts with programmers, and bears financial responsibility for its proportionate share (5/32) of the costs incurred in the development of a transmit/receive encryption system.[102] Moreover, USSB had paid $1.3 million for development of the satellites to be used for USSB's channels at the two other orbital locations that it does not share with DIRECTV, and had made separate arrangements for launch of those satellites.[103] By

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[100] To the extent ACC has submitted its construction contract with its semi-annual reports, it has redacted the figures for progress payments. Despite a request for these figures during an *ex parte* meeting with ACC, the company has not provided the requested information.

[101] *USSB II*, 7 FCC Rcd at 7249.

[102] *See* USSB Comments at 4.

[103] *Id.* at 7251.

contrast, ACC would own no part of the satellites to be launched: its control over the channels is irrevocably contracted away under the CPA and sold outright under the assignment agreement. ACC would also abandon its rights under its own satellite construction contract with Martin Marietta.[104] USSB's partial satellite ownership and independent operation are not comparable to ACC's arrangements either to "sell" transponder capacity to TCI or to assign its entire permit to Tempo DBS.

52. Finally, the timing of ACC's extension, assignment, and modification requests indicates that it did not intend to implement its DBS system alone or in cooperation with other permittees. ACC requested assignment of its permit just eleven weeks before it would have expired. Prior to that request, ACC had repeatedly revised its construction schedule to delay milestones and payments.[105] USSB, on the other hand, made its arrangements to share a satellite with DIRECTV at least a year in advance of the scheduled expiration of its construction permit, and less than three months after DIRECTV received its channel assignments at the common orbital location. Moreover, USSB made payments to DIRECTV totalling forty percent of the contract price before the Commission approved an extension of time, and continued to pay for development of two additional satellites, investing in the ultimate success of its own DBS system rather than speculating on the possibility of being rescued at the eleventh hour by a suitor.

53. USSB's investment in an independent DBS operation using a portion of DIRECTV's satellite is not analo-

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[104] After consummation of either the CPA and the transfer agreement, ACC would be obligated to maintain the construction contract in effect "for the benefit of TCI" if necessary to maintain the construction permit, and TCI would reimburse ACC for any payments made on that contract. *See* CPA at §§ 7.2, 13.16; Agreement and Plan of Reorganization at §§ 7.3, 13.16.

[105] *See* ¶ 35, *supra*.

gous to ACC's proposal either to sell transponder capacity on a satellite that it never contracted to build, or to transfer its permit outright and have no further involvement in the DBS service. As Tempo DBS said, "ACC does not propose to make any contribution to the Tempo program." [106] We consider the lack of ongoing involvement a key distinction between these two cases.

b. Directsat

54. Directsat received its DBS construction permit in August 1989.[107] We determined that Directsat had satisfied the first due diligence requirement in November 1993, and accordingly assigned it 10 channels at 119°.[108] Five months later, Directsat sought to transfer control of its permit to the parent company of EchoStar, which held 11 channels at the same orbital position.[109] We granted authorization for that transfer, specifically approving the for-profit nature of the transaction.

55. ACC and the other petitioners have argued that our resolution of the *Directsat* case mandates approval of ACC's extension application.[110] We disagree.

56. First, unlike ACC, Directsat *did not request an extension* of its DBS construction permit. Second, as we noted in granting the transfer application. Directsat's investment in the development of its DBS system had been "substantial," and its progress toward actual implementation had been "*steady and consistent with the schedule*

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[106] *See* Tempo DBS App. for Review at 10.

[107] *Continental*, 4 FCC Rcd at 6300.

[108] *Directsat Corp.*, 8 FCC Rcd 7962 (Vid. Svc. Div. 1993). Directsat was also assigned one channel at 110° W.L. and 11 channels at 175° W.L. *Id.*

[109] *Directsat*, 10 FCC Rcd at 88.

[110] ACC App. for Review at 21; Tempo DBS App. for Review at 17-19.

established in its construction contract." [111] By contrast, ACC has consistently delayed the schedule established in its construction contract.[112]

57. ACC argues that it has done as much as Directsat did, thus it too has proceeded with "due diligence." [113] This contention is not supported by the facts. First, the measure of what constitutes due diligence is different depending on where the permittee is in the term of its construction permit. Put another way, we expect an applicant to have accomplished more at the end of a permit's life than in the middle.[114] Second, even without this distinction, Directsat accomplished more than ACC has to date.

58. We recognize that a DBS permittee could encounter significant difficulty in proceeding with the construction of its system prior to receiving its specific orbital/channel assignments. Such information enables satellite contractors to order parts that are available only on several months' notice, complete satellite designs, and begin construction based on a particular satellite configuration.[115] Until a permittee receives its orbital/channel assignments, there is a practical limitation on the progress it can make toward construction of its satellites. Moreover, a permittee without specific assignments is in no position to negotiate with other permittees for joint or coordinated development of their systems. Thus, we draw

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[111] *Directsat*, 10 FCC Rcd at 89 (emphasis added).

[112] *See* ¶ 35, *supra*.

[113] ACC App. for Review at 21.

[114] As we previously advised ACC, "the grant of Advanced's extension request is not dependent upon a comparison between its showing and that of [another DBS permittee], but is instead dependent upon the merits of its showing." *Advanced*, 6 FCC Rcd at 2274.

[115] *See Dominion Video Satellite, Inc.*, DA 95-1734 (August 4, 1995).

a distinction between the progress we expect from permittees who have received orbital/channel assignments and those who are awaiting such assignments.

59. In this case, ACC received channel and orbital assignments, based on its 1990 due diligence showing, in April 1991, over three years prior to the expiration of its permit. Directsat submitted its due diligence showing five months after ACC, but received its channel and orbital assignments in November 1993—two and a half years after ACC and less than two years prior to the expiration of its construction permit. Despite ACC's early receipt of orbital/channel assignments, it failed to commence satellite construction or come to terms with any DBS permittee on joint development of a DBS system. ACC's merger negotiations with EchoStar continued for almost three years, from early 1992 through late 1994, during which time ACC repeatedly deferred its satellite construction milestones. Directsat, by contrast, successfully negotiated a merger with the same permittee, EchoStar, within five months of the award of its channel assignments.

60. When the Commission found that Directsat had satisfied the first prong of the due diligence obligation, it had a contract for delivery and launch of its first satellite in November 1997 and its second satellite in May 1998.[116] When the Commission granted the transfer of control to EchoStar, Directsat was still proceeding toward construction under the same contract with virtually the same timetable.[117] At the time the Commission found that ACC had met the first due diligence requirement as clarified in our *Continental* order, ACC's contract provided for delivery of its first satellite in January 1994.[118]

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[116] *Directsat Corp.*, 8 FCC Rcd at 7964 n.4.

[117] *See* Directsat Semi-Annual Report (dated August 16, 1994) (schedule calls for delivery of first satellite on January 2, 1998, and second satellite on July 2, 1998).

[118] *Advanced*, 6 FCC Rcd at 2272.

By May 1993, the delivery date had slipped to June 1996. By April 1994, construction was not even to *start* until April 1995, with delivery scheduled for the spring of 1998. All other payments and activities had been deferred accordingly.[119] Unlike Directsat, ACC was not proceeding on the contract that we had previously considered and used as a basis for assessing due diligence. ACC essentially abandoned construction of its DBS system during its negotiations with EchoStar. ACC could have struck a deal earlier. Alternatively or in tandem, it could have proceeded to build its system. It made a business decision to do neither until its permit was about to expire.

61. The for-profit sale of a construction permit for an unbuilt radio or television broadcast station is prohibited by the Commission's rules.[120] In *Directsat*, we said that the reasons underlying this restriction—maintaining the integrity of the application process and promoting the expeditious inauguration of new service—serve important Commission objectives. But we held that a similar restraint need not be applied to DBS precisely because we had adopted due diligence and semi-annual reporting requirements to accomplish these same ends.[121]

62. *Directsat* stands for the proposition that there is no *per se* rule against selling a DBS construction permit for profit. It does not suggest that a construction permit should be extended for a party that has not been proceeding with due diligence, simply because that would allow the party to sell the permit for profit. In fact, the contrary is true. *Directsat* allows for-profit sales of permits based on the assumption that our due diligence rules will suffice to prevent warehousing.[122] For this assump-

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[119] ACC Semi-Annual Reports (dated May 10, 1993 and April 27, 1994).

[120] *See* 47 C.F.R. § 73.3597(c)(2).

[121] *Directsat*, 10 FCC Rcd at 89.

[122] The Commission's policy against warehousing is "designed to prevent an entity from acquiring, or retaining, orbital spectrum

tion to make any sense, we must enforce our due diligence rules, not extend the permit of those who have not met their obligations.

63. Directsat negotiated and consummated a transaction with EchoStar in five months that had eluded ACC for almost three years. While negotiating, Directsat continued to progress toward construction and operation of its DBS system, whereas ACC did not. Even ignoring the fact that Directsat did not request an extension of its permit, the circumstances of its case differ so markedly from the circumstances of this case that it serves only to demonstrate that a different outcome is appropriate here.[123] Our *Directsat* decision therefore lends no support to ACC's position.

B. *Method for Future Assignments of DBS Resources*

64. The DBS due diligence rules were designed to ensure that permittees would go forward expeditiously with the development of their systems. In this case, ACC's lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit. Such a result would be contrary to the public interest in the prompt and efficient use of DBS spectrum to provide a competitive service to the public. Since ACC has failed to fulfill its due diligence obligations, its DBS construction permit will be cancelled and the associated orbital channel assignments will revert to the public for reassignment.

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on the basis of speculative demand at the expense of other potential users." *GTE Corp. and Southern Pacific Co.*, 94 F.C.C.2d 235, 261 (1983).

[123] Petitioners assert that if we apply the same due diligence standard to Directsat as was applied to ACC, we will be forced to deny the extension requested by Directsat, whose permit expired on August 15, 1995. *See* ACC App. for Review at 18 n.38; Tempo DBS App. for Review at 20. We will apply the same criteria to Directsat as we have applied to ACC in determining whether an extension is justified

65. In our *Continental* order, we stated that,

> in the event the permit of any of these applications, or of any of the current permittees, is surrendered or cancelled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications.[124]

At that time, we determined that such an assignment scheme would result in the most prompt disposition of the then-pending applications, and therefore would be preferable to any available comparative procedure. In almost six years since that decision, we have not had occasion to reassign any surrendered or cancelled channels.

66. EchoStar, Directsat, DBSC, and Continental ask that we reassign ACC's channels to the remaining DBS permittees, in accordance with the assignment policy announced in *Continental*.[125] However, based on the record in this proceeding, the development of DBS service and technology since 1989, and our new auction authority granted by Congress, we believe this assignment method appears no longer to serve the public interest. For the reasons discussed below, we are currently of the view that the *Continental* assignment scheme should be abandoned, and that recaptured channels (and associated orbital locations) should be subject to a new window for applications for DBS authorizations. This window would be open to new entrants and current permittees alike, and mutually exclusive applications would be decided by auction. Accordingly, we intend to issue a Notice of Proposed Rule Making that reflects this approach by the

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[124] *Continental*, 4 FCC Rcd at 6299.

[125] Letter from EchoStar to William F. Caton, dated May 12, 1995; Letter from Directsat to William F. Caton, dated May 18, 1995; Letter from Continental to William F. Caton, dated June 19, 1995; and Letter from DBSC to William F. Caton, dated July 7, 1995.

end of this month, and to reach a final determination before the end of the year.

67. In this order, we have discussed three important policy goals for DBS service: (1) efficient use of a valuable public resource (DBS channels); (2) promotion of DBS as a competitor to cable; and (3) prompt delivery of DBS service to the public. It appears that the current DBS assignment policy involves inherent administrative delay and uncertainty, and hence does not facilitate the rapid use of DBS spectrum resources for delivery of service to the public. The failure of existing procedures to produce numerous DBS operators has also impeded progress toward our goal of having DBS compete directly with cable.[126] Moreover, the current assignment scheme appears to hamper implementation of viable DBS systems and may not reflect the evolution of the DBS industry since its adoption, and therefore may no longer be consistent with these goals. Nor is it consistent with the public interest in "recover[ing] for the public of a portion of the value of the public spectrum resource made available for commercial use." [127]

68. In 1989, when the number of orbital locations and channels sought exceeded the number available in the last DBS processing round, lotteries and comparative hearings were the only options for assigning these resources.[128] Each of the then-available options for resolving mutually-exclusive applications involved complex processing proce-

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[126] This goal is shared by Congress, which indicated in the Cable Act of 1992 its strong support for services (like DBS) that compete with cable. *See* 47 U.S.C. § 748.

[127] *See* 47 U.S.C. § 309(j)(3)(C). We note that MCI has stated that it would submit an opening bid of $175 million for the 27 reclaimed channels at the 110° orbital location. *See* Letter from Gerald H. Taylor, President and Chief Operating Officer of MCI, to Hon. Reed E. Hundt (dated Oct. 10, 1995).

[128] *Continental*, 4 FCC Rcd at 6293.

dures and significant regulatory delay. We resolved the issue by granting each application only to the extent that it was possible to award an equal number of channel reservations to each applicant.[129] This assignment scheme favored mergers over mutual exclusivity among DBS permittees by assigning fewer channels than were sought by each permittee for construction of an independent DBS system.

69. This method of accommodating all applicants appears to have created significant delay in making DBS orbital/channel assignments. Unlike fixed-satellite service operators, which receive construction authorizations and orbital location assignments at the same time. DBS permittees are assigned specific channels and orbital locations on a first come, first served basis only after demonstrating proper satellite construction contracting.[130] The due diligence analysis on which these assignments are based is time-consuming and exacting. While some permittees proceed apace as assignments are made, other permittees may seek to negotiate mergers or cooperative ventures, and put construction of a DBS system on hold while waiting for a clearer picture of ultimate orbital/channel assignments to emerge. Even sincere efforts to forge a cooperative DBS venture can involve delay as

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[129] We reserved eight paired channels (the total number requested) for USSB and eleven paired channels each for ACC, Continental, EchoStar, Directsat, DBSC, Tempo Satellite, and Hughes/DIRECTV. *Id.* at 6300-01 and 6304 n.43. These channel reservations were 5 paired channels fewer than had been requested by ACC, EchoStar, Directsat, Tempo Satellite, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by Continental. *Id.* at 6295-97.

[130] *See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988); *American Satellite Co.*, 3 FCC Rcd 6969 (1988); *see also Establishment of Rules and Policies for the Digital Audio Radio Satellite in 2310-2360 MHz Frequency Band*, FCC No. 95-229, June 15, 1995 (proposed rules provide for simultaneous grant of applications and assignment of orbital locations).

parties negotiate agreements and seek the necessary Commission approval of a merger or sale.[131] Moreover, requests for extension of time, modification requests, and transfers or assignments all require independent review by the Commission, in addition to the analysis of each permittee's due diligence demonstration.

70. It appears that such delays would only be perpetuated by reassignment of ACC's channels under the policy announced in *Continental*. In that case, six permittees (other than ACC) received a total of 30 paired and 8 full-CONUS channels fewer than they had requested.[132] Under *Continental*, each of those permittees would have the first right to a *pro rata* distribution of ACC's cancelled channels. As a result, six permittees would be assigned four paired channels each, further complicating the already fractured distribution of DBS channels.[133] Since four channels may not provide sufficient capacity to operate a viable system,[134] such piecemeal assignment of channels could render the potentially full-CONUS orbital location at 110° unusable by any single permittee. We could then anticipate further delays as the permittees negotiated to aggregate a sufficient number of channels (by merger or buyout) to justify the expense of launching a DBS service at that location. In the mean-

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[131] We reemphasize here that, while some delays may result during negotiations on mergers or cooperative arrangements, the negotiating parties must still comply with our due diligence requirements, and failure to make appropriate progress towards completion of an operational system is not excused by such negotiations.

[132] *See* footnote 129, *supra*.

[133] For example, Directsat has been assigned a single channel at 110°, and USSB has three channels at the same location. *See* footnotes 94 and 108, *supra*.

[134] Tempo Satellite has recently indicated that even the 11 channels it has at 119° "are not sufficient for a competitive system." *See* letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

time, the public would suffer as these valuable DBS resources went unused.

71. In addition, we fear that assigning channels pursuant to *Continental* will indefinitely delay completion of the last DBS processing round. This is a real prospect because the requests for a total of 30 paired and 8 full-CONUS channels of the six permittees who received fewer channels than requested in *Continental* could not be satisfied by distributing ACC's 27 cancelled pairs of channels. Absent a change in policy, these requests could only be satisfied upon cancellation or surrender of another's permit. Thus, existing DBS processing procedures, in combination with the policy adopted in *Continental*, have not fostered the swift construction and operation of DBS systems.

72. It is our current opinion that opening a window for new applications for DBS permits to use reclaimed channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. EchoStar argues that the Commission may not revisit the *Continental* decision without prior notice to the public and a complete record on the issue of channel/orbital assignments.[185] Our decision to initiate a rulemaking proceeding on these issues (*see* ¶ 66, *supra*) obviates these concerns. Moreover, our commitment to expedite that rulemaking will ensure that the cancelled channels are reassigned, either by auction or some other method, in January 1996.

73. It does not appear that adoption of a new assignment method would present a significant barrier to successful implementation of DBS service by the parties affected. All of the permittees have received the orbital/channel assignments that we specifically reserved for them in *Continental*, and no permittee has received any additional assignments as a result of cancelled or surrendered per-

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[185] *See* EchoStar Opp. at 32-33; Letter from EchoStar to William F. Caton, dated June 16, 1995.

mits.[136] Although existing permittees' DBS plans may be sufficiently flexible to incorporate additional channels, several are already, or very soon will be, successfully operating their DBS systems without the further assignments. Moreover, we suggested in *Continental* that permittees enter cooperative ventures if existing assignments proved insufficient. Permittees that have done so have met with success: Directsat has joined with EchoStar and they are scheduled to begin operations within months; DIRECTV and USSB currently provide independent services from a shared satellite. Thus, plans of existing permittees and licensees for DBS service will not be unduly disrupted if they receive no additional channels assignments.

74. For the foregoing reasons, we will initiate a rulemaking proceeding this month to consider new rules for the DBS service. This proceeding will consider new processing procedures and auction rules to assign any available DBS orbital/channel resources. We may also propose rule changes in the wake of DIRECTV/USSB's successful deployment of full-CONUS DBS service. We approved such service only on a conditional basis in 1989 due to uncertainty about its technical feasibility. In light of its apparent success, certain aspects of our assignment policy need to be reconsidered. We intend to adopt rules to usher in a new era of DBS service to the public, in which DBS orbital/channel assignments are swiftly utilized and the public reaps the full benefit of DBS spectrum resources.

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[136] Two permittees have not yet received assignments for their western orbital locations only, one because it had not yet demonstrated due diligence in contracting for its western satellite, and the other because it had not yet indicated which western orbital location it preferred. *See EchoStar*, 7 FCC Rcd at 1771; *Dominion Video Satellite, Inc.*, DA 95-1734 (August 4, 1995).

C. *EchoStar's Request as to Prohibited Ex Parte Communications*

75. On May 30, 1995, the Commission's Acting Secretary, on behalf of the Managing Director, notified the parties of several prohibited *ex parte* communications that had occurred in this proceeding.[137] These communications were comprised of: (1) three oral presentations by a CATA representative made by telephone to two Commissioners' legal assistants on May 2, 3, and 4, 1995; and (2) three oral presentations made by representatives of CATA, C-SPAN, and Comcast, respectively, to two Commissioners and their legal assistants on May 8, 1995, while they were attending the National Cable Television Association Convention. In reporting these *ex parte* communications, the Commission employees indicated that they were unaware at the time that the proceedings were restricted and also stated their belief that none of the persons making the presentations (none of whom were parties to the underlying proceeding) were aware that the proceedings were restricted.

76. Further, on May 15, 1995, the Chairman of General Instrument Corporation ("GIC"), which is also a non-party, made a written *ex parte* submission to all of the Commissioners. One week later, GIC notified the managing Director that, unaware of the proceeding's restricted status, it had made the impermissible written communication.[138] GIC then served copies of its submission on all parties.

77. EchoStar has requested an investigation to determine whether any additional *ex parte* communications oc-

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[137] *See* Letter from William F. Caton, Acting Secretary, to Robert W. Johnson *et al.*, dated May 30, 1995. This notification was made pursuant to and in compliance with Section 1.1212(e) of the Commission's Rules, 47 C.F.R. § 1.1212(e).

[138] *See* Letter from Ronald K. Machtley to Andrew Fishel, Managing Director, dated May 22, 1995.

curred while the proceeding was still restricted and such communications were therefore prohibited under the Commission's rules.[139] Although on May 26, 1995, the Commission issued a public notice changing the status of this proceeding from restricted to non-restricted,[140] and EchoStar subsequently used the opportunity afforded by this reclassification to hold discussions with Commission personnel, EchoStar contends that this "cannot cure the potential harm caused by prior prohibited efforts to influence the process."[141] It therefore requests that the Commission issue an order to show cause why the Commission should not draw inferences adverse to the positions advocated in the *ex parte* communications, as a sanction for violation of the Commission's rules.

78. We see no reason to conduct an investigation into whether additional prohibited *ex parte* communications may have occurred. We note that as soon as Commission personnel learned that the proceeding in question was a restricted matter, appropriate disclosure of the oral contacts was made. We further note that as soon as GIC realized that its written presentation was not permissible under the Commission's *ex parte* rules, GIC itself promptly notified the Managing Director of the com-

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[139] *See* footnote 29, *supra*.

[140] *See* Public Notice No. 54107 (Int'l Bur. May 26, 1995) ("Ex Parte Notice"). Our rules provide that "the Commission retains the discretion to issue public notices setting forth modified or more stringent *ex parte* procedures." 47 C.F.R. § 1.1200(a). In this instance, because the application proceedings raised "complex legal and policy issues" and concerned "rapid developments in the DBS service, the Bureau determined that modification of the *ex parte* rules would "assist the Commission in developing a more complete record on which a well-reasoned decision can be made." Ex Parte Notice at 1. Although EchoStar questions the wisdom of the Bureau's reclassification of this proceeding, we decline to undo the Bureau's reasonable exercise of its discretion.

[141] Letter from Philip L. Malet to Andrew Fishel, Managing Director, dated June 13, 1995, at 3.

munications and served copies of the prohibited presentation upon the parties to the proceeding. In view of these circumstances, we have no reason to believe, and EchoStar has not offered evidence to suggest, that any additional presentations not permitted under the rules have occurred. We therefore deny EchoStar's request for an investigation.

79. We also deny EchoStar's request that we issue an order to show cause why the Commission should not draw inferences adverse to the positions taken in the improper *ex parte* communications. EchoStar has identified two specific arguments that it asserts were made in those presentations: (1) that grant of ACC's applications is necessary to ensure competition to DIRECTV; and (2) that grant of ACC's applications will provide digital programming capability to rural cable systems.[142] We note that the persons who made the prohibited communications were not parties at the time the presentations were made and that, even though they have subsequently attempted to become participants in this proceeding, they have failed to satisfy the requirements for party status.[143] In any event, we are not persuaded that any harmful prejudice has occurred that would warrant the requested sanction. The substance of the prohibited presentations were fully disclosed soon after they were made, similar arguments were made on the record of the proceeding, and EchoStar has thus had a full opportunity to respond to the substance of these claims both orally and in written submissions. We therefore deny EchoStar's request for sanctions.

IV. ORDERING CLAUSES

80. Accordingly, IT IS ORDERED that the Applications for Review filed by Advanced Communications Corporation and Tempo DBS, Inc. are DENIED.

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[142] *See* EchoStar Opp. at 42-43.

[143] *See* ¶ 16, *supra*.

81. IT IS FURTHER ORDERED that the Applications for Review filed by Primestar Partners, L.P., Cable Telecommunications Association, and General Instruments Corporation are DISMISSED for lack of standing.

82. IT IS FURTHER ORDERED that the Motion for Expedited Action filed by Tempo DBS, Inc. is DISMISSED AS MOOT.

83. IT IS FURTHER ORDERED that the Request by EchoStar Satellite Corporation for an investigation into and imposition of sanctions for prohibited *ex parte* communications in this proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM F. CATON
Acting Secretary

Separate Statement of
Commissioner Susan Ness

Re: *Advanced Communications Corporation*

By our actions today, the Commission upholds the requirement of due diligence in satellite construction by cancelling the Direct Broadcast Satellite (DBS) permit of Advanced Communications Corporation (Advanced) and expresses its preliminary view that auctions should be used to reassign DBS channels and orbital positions—a solution that is simple and, above all, fairest to all parties.

Failure to Meet Due Diligence

Today's ruling affirms the determination by the International Bureau of lack of due diligence by Advanced. This result is compelled by the evidence before us. In 1991 the Commission granted Advanced's first request for a four-year extension of time to construct a DBS system, but warned that future extension requests for DBS permits would require a showing of concrete progress. I have combed the record, seeking supporting documentation for the proposition that Advanced heeded the Commission's clear warning in 1991. Regrettably, I have found no credible evidence. Advanced never even began construction of a satellite—much less commenced DBS operations —during the four additional years for which the Commission had extended Advanced's initial six-year permit.

In its 1991 order, the Commission stated that "continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization."[1] This admonition applied to all construction permits for which an extension might be sought after 1991. The message should have been especially clear to any party contemplating a request for a *second* extension. Nonetheless, Advanced relies upon

[1] *Advanced Communications Corp.*, 6 FCC Rcd. 2269, 2272, *recon. denied*, 6 FCC Rcd 6977 (1991).

technological developments and changed plans to justify its extension request. An applicant cannot claim it has met every milestone and deadline in a contract for satellite construction, when every meaningful milestone and deadline repeatedly is pushed into the future by contract amendment.

The facts recounted in the Memorandum Opinion and Order establish conclusively, in my mind, the lack of due diligence on the part of Advanced.

Disposition of Returned DBS Orbital Assignments and Channels

Once the factual issue of due diligence is resolved, the more difficult issue becomes the disposition of Advanced's DBS channels and orbital locations. This requires the Commission to weigh a complex array of competing considerations.

Some argued that, notwithstanding a finding of lack of due diligence, the Commission should allow Advanced to transfer its construction permit to a party of its own selection. Others argued that the channels should be publicly auctioned by the Commission to allow all interested parties the opportunity to participate. I have weighed these alternatives carefully but have not been persuaded that the public interest would be served by allowing Advanced to transfer its construction permit to Tempo DBS, Inc. (Tempo).

In particular, I have evaluated claims that allowing the transfer to Tempo will expedite the availability of an alternative supplier of DBS service, that cancelling the construction permit will disrupt business plans of a number of parties, and that recapture and auction of the channels would cause an entrepreneur who showed great vision and contributed significantly to the development of DBS to be left empty-handed. These arguments certainly have some merit. But ultimately I find that they

are outweighed by the need for credible enforcement of our rules and even-handed treatment of potential DBS suppliers.

I have determined that the lack of due diligence requires us to cancel Advanced's permit. I do not believe that a licensee who has clearly failed to comply with Commission rules should be given the right to choose the party to receive its permit, particularly where the demand for the commercially valuable spectrum at issue—twenty-seven full CONUS DBS channels—far exceeds the supply. Tempo's progress toward construction of a satellite for its assigned DBS channels at a different orbital location is not a substitute for Advanced's failures. I believe that the better approach is to make prompt preparations to offer the opportunity to construct and operate a DBS satellite from Advanced's orbital locations to all interested parties.

Conclusion

Although I do not subscribe to the notion that auctions are the best solution in every circumstance, in this instance an auction may be the quickest and fairest means of distributing the channels to those who value them the most. Advanced and Tempo will be free, of course, to bid at an auction. It is my intention to move expeditiously to establish a new method for reassigning DBS channels so that all prospective bidders will have an opportunity to compete. In my judgment, no other approach comports as well with our mandate to serve the public interest.

SEPARATE STATEMENT OF COMMISSIONER RACHELLE B. CHONG

Re: Advanced Communications Corporation, File Nos. DBS-94-11EXT, et al.

I write separately in this matter to set forth my reasons for our decision. This was a perplexing case that required particularly painstaking analysis. There were many legal and factual issues to resolve, and many legitimate interests to balance. I firmly believe that the result that the majority has reached is correct as a matter of law, is fair to all interested parties, and will encourage the swift delivery of additional Direct Broadcast Satellite (DBS) service to consumers. For these reasons, I support the decision.

Due Diligence

I fully support the portion of this decision that concludes that Advanced Communications Corporation ("Advanced") did not meet our due diligence requirements. Section 1 of the Communications Act of 1934 charges the Commission with the job of ensuring United States citizens a "rapid, *efficient*, Nation-wide, and world-wide wire and radio communication service." [1] The warehousing of spectrum by our licensees does not serve to encourage an efficient use of the scarce and valuable public airwaves. The Commission has repeatedly expressed our commitment to discourage spectrum warehousing by methods including enforcement of our due diligence rules.

The Commission's rules at the inception of DBS service were designed to foster this fledging service. Despite some flexibility given to DBS permittees in the early years, however, the Commission did impose a two-part due diligence requirement to which exceptions would be allowed only in the "most extraordinary circumstances." [2] In seven

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[1] 47 U.S.C. § 151 (emphasis added).

[2] Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 FCC 2d 250, 254 (1983) ("[W]e presently believe that

cases, the Commission has enforced its due diligence requirements as to the first prong of the due diligence rule. The instant case implicates the second prong of our due diligence requirement which goes to construction and launch of the DBS system.

The decision sets out in detail all the public statements in which the Commission made clear to all DBS licensees that sufficient progress towards the construction, launch and initiation of a DBS system was required to meet our due diligence rules. In my view, Advanced knew, or should have known, from the Commission's rules and these statements that a DBS permittee was required to make reasonable progress toward construction and launch of its DBS system in order to maintain its authorization.

Upon careful review of the record in this case, it is apparent to me that, while Advanced did make some effort to promote the DBS concept and participate in legislative, regulatory and publicity efforts to promote DBS development, it was not making adequate efforts to actually construct, launch and initiate its DBS system. It is the latter and not the former that our rules require. Thus, it is my belief that the due diligence finding in the decision was correct under both our rules and caselaw.

Remedy

Having concluded that Advanced did not meet its due diligence obligations, the next issue became how best to proceed. In my view, when a DBS permittee fails to meet its due diligence requirements, the appropriate remedy is for the government to recover the channels and orbital slots assigned to that permittee and make them available to others who are committed to using them to serve the public interest. To do otherwise would allow permittees

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only a showing of the most extraordinary circumstances would warrant consideration of any request by a . . . permittee for an extension of the due diligence requirement beyond July 17, 1984.").

to improperly warehouse spectrum. Again, given the increasing demand for spectrum, a conscientious Commission simply should not allow spectrum to lie fallow.

We recognize in this order that our method of reassigning these channels should take account of the *current* state of the DBS industry and our regulatory authority. With this in mind, I find the reassignment method set forth in our 1989 *Continental* decision [3] unsatisfactory. Much has changed since the Commission adopted that order six years ago. The DBS industry has moved well beyond its nascent stage with two DBS providers in the sky. Moreover, the development of digital technology has expanded the potential uses for this spectrum. The record in this proceeding further demonstrated that there are many entities who stand ready, willing and able to take these channels and bring DBS service to the public swiftly.

Further, in 1993, Congress granted this agency authority to choose licensees through auctions. We have successfully used auctions to grant licenses in other services. We have found that auctions are an efficient and effective means of licensing that brings service to the public quickly by those who have the financial wherewithal to provide service in the marketplace. The auction approach also produces a tangible monetary benefit for the American public for the use of the public resource by the licensee. Such benefits should not be overlooked.

Given these changes, I believe that it is incumbent on the FCC to consider carefully how best to reassign the channels recovered from Advanced. While I recognize that some argue that there could be additional delay associated with recovery of the spectrum and reassigning

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[3] Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990). In *Continental*, the FCC stated that it would distribute any recovered channels among other permittees, up to the number of channels requested in their applications. 4 FCC Rcd at 6299.

the channels, I believe that the delay can be minimized by the commitment we make to act quickly. Though a difficult decision, it is my view that this is the correct and fairest decision.

DISSENTING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Advanced Communications Corporation Application for Extension of Time To Construct, Launch, and Operate a Direct Broadcast Satellite System; Application for Consent To Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.; Application for Modification of Direct Broadcast Satellite Service Construction Permit (File Nos. DBS-94-11EXT, DBS-94-15ACP, DBS-94-16MP).

Pursuant to today's action, the Commission affirms the International Bureau's ("Bureau") determination that Advanced Communications Corporation ("ACC") failed to meet its due diligence obligation of proceeding expeditiously with the construction and launch of its direct broadcast satellite ("DBS") system.[1] As a result, the channels and orbital locations previously assigned to ACC will revert to the public for reassignment. Further, the Commisison has chosen to initiate a rule making to establish a new methodology by deciding upon mutually exclusive applications for the reassignment of DBS channels and orbital positions. As a result of my disagreement with the Commission's due diligence findings in this case, I feel compelled to dissent from today's decision.

In the past when reviewing due diligence efforts by DBS permittees, the Commission has heretofore granted extensions to several permittees in an effort to encourage the delivery of DBS service to the public. To that end, over the years, the Commission has exercised greater flexibility when reviewing the due diligence criteria for various DBS permittees, even though these somewhat relaxed expectations may have proven unacceptable for other video programming providers in the marketplace. It would

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[1] *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995).

therefore, in my opinion, seem entirely unreasonable, and indeed, irresponsible, for the Commission to disregard its primary objective—to encourage competition amongst DBS providers in order to enhance consumer choice—by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future.

The Commission's due diligence requirements have two components. First, the Commission requires that a DBS permittee begin construction or complete contracting for construction of the satellite station within one year of the grant of its construction permit. Secondly, the permittee must begin operation of the satellite station within six (6) years of the grant of its permit, unless otherwise determined by the Commission.[2]

In denying ACC's request for an extension, the Bureau concluded that, from its assessment of the totality of the circumstances, ACC had made little progress in the construction, launch and initiation of a DBS system in the past decade. The record indicates that in 1984, the Commission granted ACC's application for authority to construct and launch a DBS system, subject to its fulfillment of the Commission's due diligence requirements. In October 1986, the Commission found that ACC had complied with the first due diligence component by contracting for the construction of its first two DBS satellites. As a result, the Commission granted ACC's request for sixteen (16) channels at each of two orbital locations. In addition, ACC requested additional channels at these locations as part of its modification application. The Commission reserved, but did not assign, eleven (11) additional pairs of channels for ACC conditioned upon ACC's satisfaction of the first prong of due diligence. In February 1990, Advanced applied for a four year extension of time to construct and operate its DBS system. The Commission granted this request in April 1991 (ex-

[2] *See* 47 C.F.R. § 100.19(b).

tending the deadline to December 7, 1994), and assigned ACC nineteen (19) additional channels. Importantly, as the record indicates, ACC did not receive its final channel assignments until April 1991. Therefore, I believe it is imperative that we focus our review on ACC's actions subsequent to that date.

Despite ACC's efforts in developing its DBS system, to wit: ACC's failed negotiations for a joint venture with another DBS permittee, Echostar Satellite Corporation ("Echostar") as well as its contractual agreement with Tempo DBS, Inc. ("Tempo")[3] for the construction and launch of a satellite, the Bureau concluded that these actions did not amount to the actual construction of a DBS satellite or arrangement for the launch and operation of DBS service. I am puzzled as to why the Bureau determined to apply a different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service in reaching its finding that ACC had not met the due diligence requirements.

I do not believe that ACC's efforts are patently distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application. For example, in July 1991, United States Satellite Broadcasting, Inc. ("USSB") filed an extension request and a minor modification of its construction permit concerning its authorization to operate a DBS satellite on five (5) channels at a specific orbital location. In its minor modification application, USSB stated that it had entered into an agreement with another entity, Hughes Communications Galaxy, Inc., ("Hughes"), to purchase a payload of five (5) transponders. Significantly, these transponders were not on one of USSB's constructed and launched satellites, but on one of Hughes' satellites, to be located at the same orbital location as USSB's channels. As a result, USSB

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[3] Tempo DBS is an affiliate of Tele-Communications, Inc. ("TCI").

sought authority to implement its five (5) channel service by utilizing five (5) transponders on one of Hughes' satellites rather than constructing and launching a separate five-channel GE Astro-Space satellite as previously proposed and approved.[4] In addition, USSB sought to modify the technical specifications of its authorization to conform to the specifications of the Hughes satellite. It should be noted that USSB's DBS system was required to be in operation by December 1992, while Hughes' system was not required to be in operation until December 1994. As a result, USSB requested that its completion date be reconciled with that of Hughes. In that case, the Commission applied an analysis that led to the conclusion that the ultimate goal of service to the public would be advanced by a grant of USSB's request for extension of time.[5]

In this *Order,* the Commission also concludes that ACC's due diligence efforts were different from those of Directsat Corporation ("Directsat").[6] I am not persuaded by the Commission's findings. Directsat received its DBS construction permit in August 1989. The Commission determined that Directsat had satisfied the first due diligence requirement in November 1993 and accordingly assigned it ten (10) channels. Only five months later, Directsat sought approval for transfer of control of its permit to Echostar's parent company. Interestingly, Echostar held eleven (11) channels at the same location as those held by Directsat. The Commission granted that authorization in November 1994.[7]

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[4] *See In re Applications of United States Broadcasting Company, Inc.*, 7 FCC Rcd 7247, 7249 (1992).

[5] *Id.* at 7250.

[6] *See In re Application of Directsat Corporation and Echostar Communications Corporation*, 10 FCC Rcd 88 (1994).

[7] It should also be noted that Directsat was permitted to profit from its sale of the permit. Because of my unwillingness to support our finding of no due diligence here, I am persuaded that ACC should have been afforded the same opportunity.

It appears that the Commission credits Directsat for negotiating and consummating a transaction with Echostar in a much more expeditious fashion than ACC. While I acknowledge that an uncertain business situation, or an unfavorable business climate in general have not been adequate explanations for failure to meet a construction timetable,[8] I do believe that, under these circumstances, the Commission must remain cognizant about the practicalities of the marketplace. A period of lengthy negotiations does not necessarily denote a clear intention to delay. Indeed, negotiations between Echostar and ACC failed within one (1) year of the grant of ACC's April 1991 extension. Clearly, the negotiations between ACC and Echostar involved a substantial transaction that finally resulted in protracted litigation. As evidenced by the record, both parties proceeded to conduct negotiations with other parties. Unfortunately for ACC, such events transpired near the expiration of its construction permit. On the other hand, we note that Directsat immediately consummated a deal with Echostar. What the Commission fails to acknowledge is that Directsat and Echostar had the same orbital location and thus derived the benefit of economic efficiencies. On the other hand, the Commission also fails to note that negotiations between Tempo and ACC advanced to the point where Tempo began to commence construction of its satellites to accommodate the 110° orbital location.[9]

Although the Commission in the instant *Order* seeks to elaborate on various differences between ACC's and USSB's and Directsat's actions, I am not wholly persuaded that the distinctions are as obvious as espoused. In my view, a review and analysis of the Gordian knot of issues in this case will reveal certain distinctions. For

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[8] *See In re Applications of United States Broadcasting Company, Inc.*, 3 FCC Rcd 6858, 6859 (1988).

[9] I make this observation only for purposes of demonstrating an intention by the parties to proceed with a DBS system without undue delay.

instance, one may argue that the public would have also benefited from the sale of ACC's permit to Tempo by increasing the choice of DBS providers. Therefore, I do not believe that ACC's efforts are substantially incongruent with those of USSB and Directsat so as to warrant a finding of no due diligence and the revocation of ACC's permit.

By comparison with the other pertinent instances, I am not convinced that ACC did not satisfy the due diligence requirements. Unfortunately, I believe that Commission precedent in this area is murky enough so as to elicit persuasive arguments in this case for both sides. Based on the public policy concerns, however, it is clear that the Commission, in the past, gave DBS permittees greater flexibility, based on the fact that DBS service was a relatively fledgling industry in which there were very few players and in the interest of making DBS service available to the public. As a result, until such time as the Commission had established and clearly stated a definitive and inflexible approach to the due diligence standard, I believe the Commission should have used a similar basis for determining ACC's due diligence compliance. As a consequence, I would have approved an assignment of ACC's permit to Tempo.

REASSIGNMENT OF CHANNELS

The Commission has announced that it intends to initiate an expedited rulemaking proceeding to establish a new methodology for reassigning DBS channels and orbital positions. Based on the assumption that auctions will be used to reassign the reverted channels, the Commission has proposed to hold the DBS auction within the next three (3) months. Based on the Commission's past experiences with auctions and the complexities involved in developing acceptable service and auction rules, I firmly believe that such a timetable is wholly unrealistic. Moreover, I am convinced that today's decision as well as

any rules promulgated for auctions in this service will be subject to judicial challenge that will considerably delay additional DBS service to the public.

The Commission has, on prior occasions, indicated that one of its primary goals in the DBS area is to promote the prompt initiation of DBS service. Although I am loathe to prejudge a rulemaking for reassignment of the reverted channels, I am skeptical about the Commission's timetable for establishing a new methodology for the reassignment of DBS channels that will not further delay service to the public. Therefore, I will review the comments for the rulemaking which will be initiated in the immediate term with great interest.

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly disadvantaging an innocent participant. By a slim majority indicative of the difficult factual, legal and policy issues before us, the Commission has affirmed the International Bureau's finding that Advanced Communications Corp. failed to meet its due diligence obligation in the construction and launch of its DBS system. The result: Advanced's construction permit has been cancelled, its application to assign its DBS construction permit to Tempo has been dismissed as moot, and the channels and orbital locations previously assigned to ACC will likely be auctioned to the highest bidder. The practical public interest result of the majority decision: the future of a small cable operator "headend in the sky" has been jeopardized; the date for the arrival of first-ever DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed.

Because this decision demonstrates a lack of understanding of the history of the DBS service, and because it fundamentally misapplies Commission precedent, I respectfully dissent.

The History of the DBS Service

I find it interesting that the two dissenters in this case are the two senior Commissioners at this Agency. In my view, this is no coincidence. My colleague and I have experienced firsthand the growing pains of a fifteen-year-old satellite service that many experts and pundits long ago wrote off as a technology that would never make it from the drawing board into the home. This skepticism was not without some foundation, given the substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments,

and the Challenger and Ariane launch vehicle failures of the late 1980's, all of which necessitated changes in business plans, expenditure of additional funds, and delay. Moreover, my colleague and I have served on this Commission when it bravely refused, despite the dire predictions of these "experts," to abandon an industry that promised to offer subscribers an alternative to cable service.

It is this firsthand experience, together with the fact that the DBS industry is only beginning to become a viable and competitive service, that highlights to me the absurdity of the majority's decision to execute one of the survivors of this brush with marketplace death. As a veteran, this strikes me as somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad.

Lest we inhibit the viability of a service that still needs relief from undue regulatory constraints that could inhibit its growth—and by growth I mean the growth of a service that includes numerous DBS providers that can compete with each other as well as with other multichannel video programming providers—this Commission should have continued to apply its due diligence requirements in an even-handed and forward-thinking manner. Sadly, this goal will not be achieved. The decision by the majority in this case assumes that, because two DBS providers (including one owned by the largest corporation in America in 1994) launched service from a shared satellite in October of 1994, this service has "arrived." This rationale leads the majority to conclude that extensions of time can be denied, willy nilly, and that recovered spectrum should be auctioned off to anyone with a pocket deep enough to jump onto the DBS bandwagon late in the parade. This result is patently unfair to Advanced and the other DBS licensees and permittees who invested time and money 15 years ago when the possibilities that this service would become viable were minimal, at best.

Moreover, this result, despite the ambitious timetable set by the majority, will result in further delays in the initiation of service by new DBS providers.

The Commission's Due Diligence Requirement

In ruling on a request for extension of a DBS construction permit, the Commission considers "[t]he totality of the circumstances—those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." *USSB I*, 3 FCC Rcd 6858, 6859 (1988). In short, the Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits. *USSB II*, 7 FCC Rcd 7247, 7249 (Vid. Svc. Div. 1992).

The majority in this case finds that Advanced does not merit an extension because it made little progress toward construction, launch, and initiation of a DBS system, despite passage of "more than a decade, including one four-year extension of time." Majority Op. at para. 2. However, I believe that the efforts of Advanced were fully consistent with Commission precedent, and that the delay in service that will inevitably result from denial of Advanced's extension request will far exceed the minimal delay that would have resulted had Advanced's extension request and application for assignment of its construction permit to Tempo been granted. Had the Advanced/Tempo deal been allowed to proceed, a DBS satellite would likely have been launched in April 1996. One has only to look at the history of decisionmaking at this Agency to realize that it will only be through extreme luck bordering on divine intervention that the unrealistic timetable set forth in the majority decision is likely to be achieved. That decision anticipates that a major change in the policy for the reassignment of recovered channels, adoption of auction rules, and the completion of an auction, can all be finalized within the next three months.

Turning to the due diligence showing of Advanced, it is important to note that the **only** period relevant to the Commission's decision in this case is the four-year period following the grant of Advanced's first extension request, not the entire ten-year period since Advanced was granted a construction permit. The Commission previously ruled on Advanced's efforts during the initial six-year period following grant of a construction permit and that decision is not before us here. During this six-year period Advanced, like other DBS providers, failed to commence operation of its system because the Commission's initial six-year construction milestone proved to be unrealistic. As the majority opinion recognizes, provision of DBS service was not feasible for the first six years that Advanced held its permit for the reasons I delineated above: substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures.

As to Advanced's efforts during the four years since its first extension was granted, it is relevant to note that Advanced did not receive its full complement of frequencies and orbital positions until April of 1991, in a decision that did not become final until November of 1991. The Commission has stated in two recent decisions that it is unrealistic to expect permittees to begin construction until the Commission has awarded them specific orbital slots and channels. See *Continental Satellite Corp.*, 4 FCC Rcd 6292 (1989), *partial recon. denied*, 5 FCC Rcd 7421 (1990); *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), *recon. denied*, FCC No. 95-421 (Oct. 5, 1995). Therefore, for the first year of its four-year extension period, Advanced cannot have been expected to have demonstrated progress toward construction.

So we come down to the issue of what Advanced did, or did not do, between 1992 and 1995. In examining Advanced's efforts during this period, one must look to

Commission precedent in which other DBS permittees have been granted extensions with showings similar to Advanced's. None of these extension requests were denied. While it cannot be argued that there are no distinctions between the due diligence showings of Advanced and the DBS applicants whose extension requests were granted, painted on a precedential backdrop in which the Commission stated that its regulatory priority was fostering the development of a fledgling service, they constitute distinctions without a difference.

In a decision adopted in January of this year, the Commission approved Directsat's for-profit sale of its construction permit for an unbuilt DBS system to EchoStar. *Directsat Corp.*, 10 FCC Rcd 88 (1995). The Commission reasoned that for-profit sales of permits can be allowed in the DBS service because of the presence of our due diligence rules, which suffice to prevent warehousing of spectrum. *Id.* at 89. The Commission thus noted in *Directsat Corp.* that a significant amount of money had been invested in satellite construction and that construction milestones had been met. At the time the Commission approved the transfer, however, Directsat had expended 0.13% of the contract price for the construction of satellites and the construction phase of its satellites had not even begun. *See* Directsat Semi-Annual Progress Report, Exhibit E to Contract Modification No. 7, filed August 16, 1994.

Unfortunately, the majority in this case refused to attribute Tempo's investment and construction progress to Advanced, even though the Commission earlier this year had attributed Echostar's investment and construction progress to Directsat. Moreover, despite waxing eloquent for several pages, the majority fails to adequately explain why Advanced's showing is decisionally less significant than Directsat's in light of Directsat's August 1994 Progress Report. Specifically, the majority fails to note that, at the time their assignment applications were filed,

Directsat had expended a mere 0.13% of the contract price and that this constituted due diligence; whereas Advanced's payments on its satellite contract were deficient because they amounted to less than one percent of the contract price. The majority also fails to note that the actual dollar amount expended by Advanced was later specified in a letter filed in the record dated September 19, 1995, as $7-8 million. The actual dollar amount expended by Directsat prior to its merger with Echostar, while not set forth in the majority opinion or in Directsat's 1994 Progress Report, is likely significantly less than the amount expended by Advanced.[1]

The majority attempts instead to distinguish the Advanced case from *Directsat Corp.* by claiming that Directsat requested only a transfer of its construction permit, not an extension of time to construct. Directsat's DBS authorization, however, expired on August 15, 1995, and EchoStar has applied for an extension. That EchoStar would require an extension was apparent at the time Directsat filed its transfer application. Moreover, the Commission in *Directsat Corp.* felt compelled to comment on Directsat's progress toward construction of its DBS system, a comment that presumably would have been unnecessary had the Commission felt that Directsat's due diligence was irrelevant. The key difference, then, between Directsat and Advanced appears to be the order in which the extension and transfer applications were

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[1] The majority makes much of Advanced's "fail[ure] to specify how much money it actually invested in the construction of its satellites." Majority Op. at para 50. Apparently, the majority is unaware of the September 19, 1995, letter filed by Advanced as part of the record in this proceeding in which it revealed that $7-8 million was paid toward construction of its satellites. Moreover, it is interesting to note that Commission rules do not require a permittee to reveal the actual amount it has invested in its satellite system; rather the rules require that the permittee reveal what percentage of the satellite cost it has invested. Advanced, like Directsat, fully complied with this requirement in filing its progress reports with the Commission.

submitted. This distinction without a difference should not be the key factor in determining the fate of a DBS permittee, and the majority offers no reason why it should be of decisional significance.

In 1991, the Commission granted a second extension of a permittee's construction permit in light of its contract to use satellites provided by a competitor. *USSB II*, 7 FCC Rcd at 7251. The Commission based its extension on the fact that the permittee, USSB, had complied with due diligence requirements by contracting to use transponders on a satellite designed, built and launched by DIRECTV. In fact, this Commission has maintained that DBS service will be expedited if DBS permittees "are free to seek Commission approval to combine assignments and resources through merger or buyout." *Continental Satellite Corp.*, 4 FCC Rcd. at 6299 (1989). Like USSB and Directsat, Advanced heeded the Commission's admonition to proceed diligently by entering into a binding, noncontingent contract with Tempo DBS for delivery of satellites, but the Commission refused to credit Advanced with the construction progress made on the Tempo satellites. Significantly, Tempo DBS's contract to finance Advanced's satellite launch was not contingent on the transfer of channels.

The majority, in distinguishing *USSB II* and the case involving Advanced, points out that it considers "the lack of ongoing involvement a key distinction between these two cases." Majority Op. at para. 53. While in *USSB II* the ongoing involvement of USSB is clear, such "ongoing involvement" is less clear in *Directsat Corp.*, where Directsat transferred control of its DBS authorization to the parent company of Echostar. Is "Directsat" still involved in the DBS business, or is it involved in name only? In my experience, when one company is bought out by another company, the company purchased is either eliminated entirely, or continues in name only under the complete control of the buyer. Again, the majority is, in my

view, relying on a distinction without a difference in deciding to deny Advanced's extension request for this reason.

In conclusion, the majority has decided this case without taking full account of the history of this fledgling satellite service. Moreover, the majority has set up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts. As a result, the majority gives companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, and leaves one of the pioneers of the DBS service with only a panful of mica. This result squares with neither the law nor with equity, and therefore I dissent.

APPENDIX D

DA 95-944

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF

ADVANCED COMMUNICATIONS CORPORATION

File Nos. DBS-94-11EXT

APPLICATION FOR EXTENSION OF TIME TO CONSTRUCT, LAUNCH AND OPERATE A DIRECT BROADCAST SATELLITE SYSTEM

DBS-94-15ACP

APPLICATION FOR CONSENT TO ASSIGN DIRECT BROADCAST SATELLITE CONSTRUCTION PERMIT FROM ADVANCED COMMUNICATIONS CORP. TO TEMPO DBS, INC.

DBS-94-16MP

APPLICATION FOR MODIFICATION OF DIRECT BROADCAST SATELLITE SERVICE CONSTRUCTION PERMIT

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995 Released: April 27, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. For more than a decade, Advanced Communications Corporation ("Advanced") has had leave to provide the

public with Direct Broadcast Satellite (DBS) service. It has had allocated to it scarce public resources—orbital positions and channels—so that it could provide that service. Advanced paid nothing for these resources. It was obligated only to proceed with due diligence to provide the service it promised. After more than a decade, Advanced has not provided—and is not close to providing—DBS service to the public. It has failed to meet its due diligence obligation. Advanced must now return the public resources it holds to the public so that these resources can be put to use by others.

2. Advanced has filed an application for a second four-year extension of time in which to construct, launch, and initiate service from its DBS system. Advanced has also filed an application for consent to assign its construction permit to Tempo DBS, Inc. (Tempo DBS). Finally, Advanced has applied for authority to modify its construction permit to allow it to substitute satellites now being constructed for Tempo Satellite, Inc.[1] Dominion Video Satellite, Inc. (DVS), EchoStar Satellite Corporation (EchoStar), DIRECTV, Inc. (DirecTV), and Directsat Corporation filed objections to Advanced's applications; Tempo Satellite and Nevada Direct Broadcasting System (Nevada) filed supporting comments. Advanced filed replies to the objections.[2]

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[1] Tempo Satellite, Inc. ("Tempo Satellite") is a subsidiary of Tele-Communications, Inc. ("TCI"), a cable operator, authorized to construct, launch, and operate 11 DBS channels at orbital slots 166° W.L. and 119° W.L. *See* Tempo Satellite, Inc., 7 F.C.C. Rcd 2728 (1992). Tempo DBS, the proposed assignee, is an affiliate of TCI.

[2] Several of the pleadings submitted by the parties were not timely filed or were not authorized under the Commission's rules. *See* 47 C.F.R. § 1.45. Such pleadings shall only be considered as informal requests for Commission action or informal comments. *See* 47 C.F.R. § 1.41. The parties' requests for extension of time are hereby denied.

3. Advanced has had over ten years, including one four-year extension, in which to construct and launch its DBS system. It has failed to do so. It has thereby failed to meet the Commission's due diligence rules—imposed a decade ago—to ensure that the public receives prompt DBS service. In the meantime, the channels and orbital positions assigned to Advanced have gone unused. Other DBS licensees have already begun operations.

4. Only by enforcing the progress requirements of the Commission's rules can we ensure that allocated resources will be efficiently and expeditiously put into productive use. In the past, we have given DBS permittees latitude in meeting due diligence deadlines in order to ensure the development of DBS services. As the Commission has previously stated, however, such latitude is not appropriate in an era in which DBS licensees are successfully operating and are competing for subscribers. Accordingly, we deny Advanced's application for an extension of time and declare its construction permit null and void. We dismiss, as moot, the pending assignment and modification applications.

II. BACKGROUND

5. In 1984, Advanced applied for authority to construct and launch a DBS system as part of the second processing round of DBS applications. The Commission granted the application subject to the condition that Advanced "proceed with the construction of its system with due diligence as defined in Section 100.19(b) of the Commission's rules." 47 C.F.R. § 100.19(b).[3] The due

[3] Satellite Syndicated Systems, Inc., 99 F.C.C. 2d 1369 (1984). Advanced's initial grant authorized it to provide service from two satellites, each to deliver six channels to half of the continental United States. Advanced subsequently applied for, and was granted, authority to increase the number of satellites in its system to five, and was later granted authority to increase the number of channels to 27. *See* Continental Satellite Corporation ("Continental"), 4 F.C.C. Rcd 6292 (1989).

diligence requirement has two components. First, the DBS permittee must begin or complete contracting for construction of its satellite within one year of the grant of its construction permit. Second, the permittee must begin operation of the satellites within six years of the grant of its construction permit, unless otherwise determined by the Commission. Section 100.19(b) provides that a transfer of control of the permit is not a justification for extension of either of these deadlines. Orbital positions and channels are not assigned to a DBS permittee unless and until it demonstrates that it has fulfilled the first component of the due diligence requirement. *Processing Procedures Regarding the Direct Broadcast Service*, 95 F.C.C. 2d 250, 253 (1983).

6. In October 1986, the Commission found that Advanced had complied with the first component of the due diligence requirement by contracting for the construction of its first two DBS satellites. Advanced was ultimately assigned to the 110° W.L. orbit location (channels 1-23, 25, 27, 29, 31) and 148° W.L. (channels 1-17, 19, 21, 23, 25, 27, 29, 31).[4] In February 1990, Advanced applied for a four-year extension of time, until February 1994, in which to construct and operate its DBS system. The Commission granted this request, extending the deadline until December 7, 1994.[5]

7. In August 1994, Advanced applied for another four-year extension of time, until December 1998, in which to construct and operate its system.[6] In September 1994, Advanced filed an application for consent to assign its construction permit to Tempo DBS.[7] In October 1994,

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[4] Tempo Enterprises, Inc. ("Tempo"), 1 F.C.C. Rcd 20 (1986).

[5] Advanced Communications Corp. ("Advanced"), 6 F.C.C. Rcd 2269 (1991).

[6] Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01/94-11EXT (August 8, 1994).

[7] Request for Consent to Assign DBS Authorizations, DBS-94-15ACP (September 28, 1994).

Advanced filed an application to modify its construction permit to change the technical design of the Advanced satellites to duplicate the design of satellites then under construction for Tempo Satellite under a separate DBS authorization.[8]

8. Dominion, EchoStar, and Directsat oppose Advanced's extension request. They contend that Advanced has not met the first component of the due diligence requirement because Advanced's contract with Martin Marietta does not meet due diligence requirements, delays in construction were not due to circumstances beyond Advanced's control, and Advanced has "warehoused" its authorized frequencies. They argue that Advanced has no valid construction permit and that Advanced's applications for assignment and modification should be declared moot. Directsat and Echostar maintain that Advanced failed to initiate operation due to business decisions within its control, that Commission precedent precludes grant of an extension of time request based on Advanced's failure to attract investors, and that grant of the extension request would prejudice permittees who have significantly passed Advanced in progress toward initiation of DBS service. Dominion argues that under Commission rules, transfer of control of an authorization does not warrant grant of a request for extension of time.[9]

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[8] Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994). In November 1994, Advanced filed an amendment to this modification request. Amendment of Application for Modification of Construction Permit, DBS-94-16MP (November 16, 1994).

[9] 47 C.F.R. § 100.19(b) states that "[t]ransfer of control of the construction permit shall not be considered to justify extension of the[] deadline[]."

III. DISCUSSION

Extension Request

9. In adopting rules and policies for DBS service, we determined that a due diligence requirement would ensure that permittees would go forward expeditiously.[10] Accordingly, Section 100.19(b) of the rules for DBS service, 47 C.F.R. § 100.19(b), states that transfer of control of the construction permit will not justify extension of due diligence deadlines. We later noted that "the rule was intended to ensure the prompt initiation of DBS service for the public, and must be enforced where permittees are allowed to hold spectrum resource for which other applications exist. . . ." [11]

10. During the "pioneering era" of DBS technology in the 1980's, the Commission granted numerous extensions of due diligence milestones. The Commission was reluctant to cancel construction permits where permittees failed to initiate DBS service "in accord with a preestablished timetable set without the benefit of experience." [12] As technology developed, however, the Commission gave permittees notice that they could not expect additional extensions. We said in 1988, "[a]s circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource[s], there does now appear [to be] a need for stricter enforcement of the construction progress requirements of the DBS rules." [13]

11. In ruling on requests for extensions of time, the Commission has stated that "[t]he totality of circum-

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[10] Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, 90 F.C.C. 2d 676 (1982).

[11] CBS, Inc., 99 F.C.C. 2d 565, 572 (1984).

[12] United States Satellite Broadcasting Company, Inc. ("USSB I"), 3 F.C.C. Rcd 6858, 6860 (1988).

[13] *Id.* at 6861.

stances—those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public—must be considered." [14] In granting Advanced's 1990 extension, the Commission relied on the substantial developments in DBS satellite technology, the Commission's development of its policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's.[15] The Commission warned, however, that "continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization." It further warned that it would "closely scrutinize all requests for extension of time within which permittees must initiate DBS service." [16]

12. Advanced asserts that a second extension is justified under the Commission's rules (and is consistent with similar extensions previously granted) because it has made "considerable efforts" to develop DBS service, it has pursued a joint venture agreement, and any delays have been due to circumstances beyond its control. Advanced also implies that the progress Tempo Satellite has made in constructing its satellites should be attributed to Advanced and that these efforts constitute a "proper showing" on which to base an extension.

13. Advanced first argues that an extension is warranted in light of its efforts to reach a joint venture agreement over a nearly three-year period beginning in 1992, even though these negotiations ultimately failed.[17] The

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[14] *Id.*

[15] *Id.* at 6860.

[16] *Id.*

[17] In progress reports to the Commission, Advanced said, in April 1992, that it expected negotiations to be completed in "the next month or two." In August 1992, Advanced reported it had signed a letter of intent that called for execution of an agreement within

Commission has previously found that on-going negotiations do not justify an extension of due diligence milestone.[18] Failed negotiations surely should fare no better. In denying an extension to another DBS permittee, we held that "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure [to] meet a construction timetable in other satellite services." [19]

14. Advanced also asserts that construction was delayed because it needed to modify its system design. In granting Advanced's first extension request, however, the Commission advised Advanced that its decision to modify its technical proposal was a business decision wholly within its control that would not generally excuse its failure to meet the due diligence requirement. To conclude otherwise would allow permittees to "extend indefinitely their nonperformance by repeated modifications of their proposals." [20] DBS technology has evolved to the point where permittees can make design decisions and proceed with construction with relative assurance that their system will be technologically competitive when it is launched. In fact, two permittees have launched DBS systems, which are both already providing service.[21] Advanced has not explained why it did not make similar design decisions for its system, or why such decisions were not wholly

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sixty days. In October 1992, Advanced explained that negotiations were continuing, and in April 1993, stated it expected to reach an agreement within the next month. In May 1993, it reported it was still in "complex negotiations," and in October 1993, it claimed that negotiations were continuing. However, on December 30, 1994, Advanced indicated that negotiations had failed.

[18] USSB I, 3 F.C.C. Rcd at 6859. *See also* Report and Order in CC Docket No. 81-704, 54 RR 2d 577, 597 n. 62 (1983).

[19] *Id.*

[20] Tempo, 1 F.C.C. Rcd at 20.

[21] *See, e.g.*, Semi-Annual DBS Progress Report filed by Hughes Communications Galaxy, Inc., DBS-84-02/81-07/93-03MP (January 24, 1995).

within its control. Accordingly, we do not find that continued modifications to Advanced's system warrant an extension of time.

15. Advanced further contends that an extension is justified because the company has expended considerable funds and "countless hours" to implement its system. Advanced asserts that the Commission has granted extensions under similar circumstances, citing *United States Satellite Broadcasting Company, Inc.*[22] In that case, the Video Services Division of the Mass Media Bureau, in considering the "totality of the circumstances," found that the permittee, USSB, (1) had expended $23 million, including a substantial payment towards spacecraft construction; (2) had demonstrated that the remaining financing for the completion and launch of the satellite had been arranged; and (3) had executed launch and various supplier contracts. Advanced, in contrast, has not specified how much money it has spent,[23] has not arranged financing, and has not procured a launch contract. Advanced has failed to show its progress constitutes sufficient justification for a further extension of time. To the contrary, it appears that Advanced wants to abandon its business to Tempo DBS.

16. Advanced further states that it should be granted an extension because it has "remained in due diligence" since we found it had met the first component of the due diligence requirement by executing a construction contract. The facts belie this conclusory assertion. The due diligence requirement consists of two components. The fact that Advanced continues to have a binding construc-

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[22] United States Satellite Broadcasting Company, Inc. ("USSB II"), 7 F.C.C. Rcd 7247, 7250 (1992).

[23] Advanced acknowledges that its expenditures on the construction contract with Martin Marietta Astrospace are less than one percent. Semi-Annual Status Report, DBS 84-01-88-05 MP and 84-01/88-05 Ext. (May 10, 1993). Subsequent reports do not include payment amounts or percentages. *See* Semi-Annual Status Reports, DBS 84-01-88-05 MP and 84-01/88-05 Ext. (October 6, 1993 and April 24, 1994).

tion contract, or that it has made all payments required by this contract does not excuse its failure to meet the second part of its due diligence requirement: operation of its direct broadcast satellite system.[24] Meeting the first due diligence requirement does not justify failing to fulfill the second.

17. Advanced also asserts that the Commission's formulation of its channel assignment policy[25] and the delay in granting previous modification requests constitute circumstances beyond its control and warrants an extension of time. However, the channel assignment policy was clarified in 1989.[26] Advanced's proposed modifications to its orbit locations and channel assignments were granted in 1991.[27] Advanced has not cited any circumstances that impeded its ability to construct its system over the last four years. Advanced has failed to show that delay in meeting the second component of due diligence is due to circumstances beyond its control.

18. Finally, Advanced asserts that an extension of its construction permit would be in the public interest, since it is on the threshold of an advanced DBS system which will benefit the public, and because doing so will promote

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[24] USSB II at 7250. To the extent Advanced relies on its contract with Tempo Satellite and TCI (pursuant to Advanced's application to assign its construction permit) in arguing that it is still in due diligence, we point out that this contract underscores Advanced's lack of commitment to establish its direct broadcast satellite system. The assignment application indicates that Tempo Satellite has arranged financing, executed contracts for satellite launch and construction and for DBS receiving equipment, and has spent $246 million on satellite construction. Advanced's sole contribution to Tempo Satellite's system appears to be its construction permit. For these reasons and the reasons stated at paragraph 18, *infra*, we find that Advanced's latest contract does not demonstrate a capability and commitment on its part to operate a DBS system.

[25] Continental, 4 F.C.C. Rcd at 6296-7 (1989).

[26] *Id.* at 6301.

[27] Advanced, 6 F.C.C. Rcd at 2274.

the efforts of those who have worked to create the DBS industry. To do otherwise, Advanced argues, would discourage innovators in all new technological industries.

19. A further extension would not serve the public interest. Advanced has made little progress in construction, launch, and initiation of a DBS system in the past decade. During the same period, two DBS satellites have been launched and construction of others is underway.[28] There is no benefit to the public in allowing Advanced to continue to waste orbital locations and channels while two permittees have already initiated DBS service.

20. Advanced's current authorization required it to begin operation of a satellite by December 7, 1994.[29] It failed to do so. The "totality of the circumstances" presented by Advanced in its extension request does not justify granting additional time in which to begin operation. Accordingly, we deny Advanced's request for an extension of time to construct, launch, and operate a direct broadcast satellite system. Because Advanced has failed to satisfy this express condition of its construction permit, the permit is null and void by its own terms.

B. *Other Applications*

21. Inasmuch as we have concluded that Advanced's permit is null and void, its pending applications for assignment of that permit to Tempo DBS and related modification application are moot and are accordingly dismissed.[30] To the extent Advanced suggests that construction progress on Tempo Satellite's DBS satellites should be considered favorably in evaluating Advanced's extension request,

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[28] *See* note 21, *supra*.

[29] Advanced, 6 F.C.C. Rcd at 2274.

[30] To the extent the pleadings address Advanced's applications for assignment and for modification of its construction permit, such pleadings are likewise moot and will not be considered.

we disagree.[31] The Commission has based previous extensions of time on a finding that the efforts made by the permittee "reveal[] no lack of capability or commitment" to establish its DBS system.[32] Tempo Satellite's construction progress is irrelevant in determining whether Advanced should be granted an extension of time in which to construct and operate Advanced's satellites.[33] Moreover, we believe it would contravene the public interest to consider Tempo Satellite's construction progress in assessing Advanced's extension request. To do so would reward permittees' inaction or failure to comply with implementation milestones. Such warehousing precludes the use of channel and orbital assignments by other service providers, and will ultimately result in delays in service to the public.

22. In its opposition to Advanced's petition for extension of time, DBSC requests that some of Advanced's cancelled channels be assigned to DBSC. DBSC's request was not made within any designated filing period for modification applications, and is hereby rejected. We will soon

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[31] Under Advanced's proposal to assign its construction permit to Tempo DBS, the satellites deployed under Advanced's permit would be those now under construction for Tempo Satellite, Inc., a DBS permittee. Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994).

[32] USSB II at 7250.

[33] Advanced refers to the Commission's recent decision in Directsat Corp., 10 F.C.C. Rcd 88 (1995), as support for approval of the assignment of its construction permit to Tempo DBS. In that case, the Commission approved the transfer of control of DBS permittee Directsat Corporation from SSE Telecom. Inc. to Echo/Comms. Unlike the circumstances here, Directsat's "investment in the development of its DBS system has been substantial and the progress set forth in its semi-annual reports has been steady and consistent with the schedule established in its construction contract." *Id.* at para. 4. Consequently, the Commission concluded that the public interest in the expeditious provision of DBS service to the public would be advanced by this sale.

issue a notice regarding the reallocation of cancelled channels and available orbital positions.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Section 0.261 of the Communications Act of 1934, as amended, 47 U.S.C. § 0.261, that the Application File No. DBS-94-11-EXT IS DENIED and the construction permit issued to Advanced Communications Corporation in *Satellite Syndicated Systems*, 99 F.C.C. 2d 1369 (1984) IS DECLARED NULL AND VOID.

24. IT IS FURTHER ORDERED, that Application File Nos. DBS-94-15ACP and DBS-94-16MP are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Scott Harris
SCOTT BLAKE HARRIS
Chief, International Bureau

APPENDIX E

47 U.S.C. § 309(j) Use of Competitive Bidding

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(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

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47 C.F.R. § 100.19 (1995) License conditions

(a) All authorizations for interim direct broadcast satellite systems shall be subject to the policies set forth

in the *Report and Order* in General Docket 80-603 and with any policies and rules the Commission may adopt at a later date. It is the intention of the Commission, however, that in most circumstances the regulatory policies in force at the time of authorization to construct a satellite shall remain in force for that satellite throughout its operating lifetime.

(b) Parties granted authorizations shall proceed with diligence in constructing interim direct broadcast satellite systems. Permittees of interim direct broadcast satellite systems shall be required to begin construction or complete contracting for construction of the satellite station within one year of the grant of the construction permit. The satellite station shall also be required to be in operation within six years of the construction permit grant, unless otherwise determined by the Commission upon proper showing in any particular case. Transfer of control of the construction permit shall not be considered to justify extension of these deadlines.